The

# Arbitration Journal







1926 1951

QUARTERLY OF THE AMERICAN ARBITRATION ASSOCIATION

Twenty-Fifth Anniversary

me 6 1951 Number 3

---


THE ARBITRATION JOURNAL is published quarterly by the American Arbitration Association, Inc.: A. C. Croft, *President;* Wesley A. Sturges, *Chairman of the Board;* Frances Kellor, *First Vice President;* Eugene F. Sitterley, *Assistant Treasurer;* A. Hatvany, *Secretary.* Annual subscription: $4 in the United States; $4.50 elsewhere in the Western Hemisphere; $5 foreign; single copies $1.25.

# THE ARBITRATION JOURNAL

VOL. 6 (NEW SERIES) 1951 NUMBER 3

CONTENTS

# World Peace Through World Trade Award

## Presented to the

## Court of the International Chamber of Commerce*

**A. C. Croft**

*President, American Arbitration Association*

It is a privilege and an honor to have the opportunity to speak to you today, and I thank you sincerely for your courtesy and hospitality.

This meeting and the organization that sponsors it are an inspiration to all the world in these most difficult times.

Thirty years ago a group of business men founded the International Chamber of Commerce, based on the idea that by meeting together and discussing world trade problems, some solutions might be reached and some standards accepted. It is most significant that the following year they established the Arbitration Court, the first plan to provide facilities for the settlement of international trade disputes on an international basis. Many of those who made up the original group had had experience in the use of arbitration in their respective countries. They knew that the prompt settlement of a difference promotes understanding and good will, and therefore they desired to extend that objective among all the nations of the world.

They laid a foundation stone on the structure of world peace that has stood the test of time and remains firm and unmoved, despite the trials and tribulations of a great world war.

Never in all world history has there been a clearer or more urgent need for men to promote understandings and good will than today. Controversy is always unpleasant; but when it concerns only domes-

* Address delivered at the XIIIth Congress of the International Chamber of Commerce in Lisbon, Portugal, on June 15, 1951.

tic problems, at least the parties speak the same tongue, have the same general background, and the differences are localized. But when controversy involves international trade and people of different tongues and customs, the gravity increases and a small trade difference may have untold effect upon world-wide relationships. That realization was clearly in the minds of those men who established the International Chamber and its Arbitration Court. For arbitration is our most significant and promising advance toward the reduction and elimination of controversy through the procedures that make it possible to determine disputes promptly, justly, and economically.

How may this be accomplished?

Only through education. Education not only of the businessman but education of all people. Any system for the settlement of disputes will be successful only when it is based on public knowledge and acceptance.

A great monument is erected by laying stone alongside of stone and layer upon layer, until the pinnacle is reached. So it is with arbitration. It must be taught in the school. It must become the habit of small business and big business. An arbitration clause must by custom be included in every business contract. As the practice grows and the will to arbitrate becomes universal, our monument will reach its pinnacle. We shall have established the habit of peaceful settlement, and the will to peace will prevail in all affairs of man.

Every commercial contract carries with it the seed of controversy, and that is especially true of international trade. Despite the splendid work of this Chamber and its committee, differences in standards, customs, and forms still exist. Today with so many varied kinds of government controls and regulations, international trade presents many more difficulties and opportunities for misunderstanding.

The work of the Arbitration Court of the Chamber and that of every organization in the world sponsoring arbitration is doubly important. Of that there can be no question.

Arbitration is an *idea* and an *ideal;* but without practical application, it will lead to nothing. Practical application requires such a body as the Arbitration Court with its panels of arbitrators, its rules of procedure, and the facilities with which it functions. But these alone are not sufficient. No matter how wise the procedures,

no matter how distinguished the panels of arbitrators, or how efficient the facilities, unless they are used, nothing will be accomplished.

The will to arbitrate must be advanced. Arbitration has been known to mankind from time immemorial, but its accomplishments for world peace leave much to be desired. We have a great opportunity before us. We must create in every country a will to arbitrate. We must establish the process so that it becomes a habit, a practice; and when businessmen regularly and habitually refer their differences to arbitration, we shall have created a will to arbitrate and a will to peace that the governments of the world shall have to respect.

May I suggest a three-point program:

1. The teaching of arbitration theory and practice in the schools and universities of every country.

2. More discussion of arbitration in trade and professional organizations throughout the world.

3. The promotion of laws recognizing the rights of parties to agree in advance to arbitrate future disputes, and providing for the enforcement of such clauses and for arbitration awards rendered under contracts including arbitration provisions.

The International Chamber should take the leadership in this important work. It can, with its great influence, secure the cooperation of educational institutions in every country, to the end that the theory and practice of arbitration will be included in a special course at such institutions or at least lectures on arbitration will be included in the regular courses in economics, trade, and law.

I have been impressed by the program for the exchange of educators. I have noted with interest the visits of American professors abroad and of educators from other lands to our country. A similar exchange of information regarding arbitration should be included in that program. We have been encouraged at the American Arbitration Association by the fact that a number of the delegations that have arrived in the United States have taken the time to visit our offices, to attend arbitration hearings in our tribunals, and generally to become acquainted with the processes and procedures that we follow.

Some of the members of these delegations have been students, and it is for them that I make a special plea. Whenever programs are arranged for visiting students in any country, part of these pro-

grams should afford an opportunity to become familiar with the arbitration processes in use in the country they visit.

My second point is the discussion of arbitration in trade and professional groups throughout the world. Every delegate here belongs to one or more trade and professional organizations. I venture to say that comparatively few, if any, have devoted any meeting or any time in the past year to arbitration. It should be included in the program of every trade, commercial, and professional organization; for only by continued exposure to the idea and the ideal of arbitration will the business and professional man remember to include arbitration clauses in the contracts and remember to use the arbitration process when controversy arises. And may I suggest that when any uniform contract is promulgated, we should make certain that one of its provisions is the agreement to arbitrate.

The legalization of arbitration I have placed third because I firmly believe that, while uniform laws enforcing arbitration provisions and awards are highly desirable, I am also of the belief that when we have created and established understanding of arbitration and the will to arbitrate, there will be little need for compulsion, either in the performance of the arbitration agreement or in the carrying out of the award.

Whenever recourse to law becomes necessary, it is a failure of moral resources; it is the failure of the parties to understand fully the implications of their agreement and of the ideal of arbitration.

The International Chamber, through its booklets on the arbitration laws of various countries, published almost 25 years ago, has done much to promote an understanding of those laws and to emphasize the need for some general uniformity. But may I again emphasize the necessity for education in the ideals of arbitration, as I have already outlined, which may make recourse to laws, if not unnecessary, at least of rare occurrence.

We of the American Arbitration Association have been proud of our relationship of the past 25 years with the International Chamber and its Court of Arbitration. We have recognized the great work that the International Chamber has done and the services that have been and are daily being performed by the Court of Arbitration. We look forward to a continuance of that relationship, of the opportunity to work side by side with that Court in providing facilities and opportunities for the prompt settlement of disputes. But we look forward even more earnestly to the opportunity to work together

for the advancement of the understanding of arbitration through education.

In recognition of the great pioneer service rendered by the Court of Arbitration of the International Chamber of Commerce, it is my privilege and very pleasant duty to present to the Court this plaque, upon the face of which is engraved:

Presented

by the

American Arbitration Association

to the

COURT OF ARBITRATION

INTERNATIONAL CHAMBER OF COMMERCE

In Recognition of Outstanding Pioneer Service in the

Advancement of International Commercial Arbitration

# Some Thoughts on the Use of Precedents in Labor Arbitration

**Herman A. Gray**

*Associate Professor, N. Y. University, and Member of the N. Y. Bar*

DOES the doctrine of stare decisis have a place in the disposition of labor disputes through arbitration? Should decisions reached by arbitrators become precedents to be followed by other arbitrators confronted by like or similar issues? Is it desirable in that way to build what might be considered a body of common law of the collective labor agreement?

Much can be said on both sides of this question. The debate has been going on for some time and the conflicting viewpoints have been presented with clarity and vigor. Perhaps here, as elsewhere in the affairs of men, the truth lies in neither extreme. Some policy would indicate a middle course.

Clearly, disputes commonly arise in the course of labor relations which simply cannot be resolved on the basis of rulings made elsewhere between other parties. Was there "just cause" for a particular discharge? Is a given employee eligible for vacation pay and, if so, for what amount? Are the machines over-manned? Or, are the men being asked to carry a work-load unreasonably burdensome? Should wage rates be adjusted upwards or downwards, and, if so, to what degree?

The determination of such questions must depend entirely on the exact wording of the particular agreement involved. Or, on the policy which should control the application of the agreement in the light of the special conditions and practices prevailing in the given plant. Little or no aid can be derived from precedents. On the contrary, reliance on precedent may produce a decision empty of reality and disruptive in its effect.

These questions are set forth merely as illustrations. Others of

the same nature and which likewise do not lend themselves to successful disposition through the use of precedents will readily suggest themselves.

Yet, it is equally clear that issues of this type do not exhaust the gamut of labor controversy. There are other disputes in the determination of which the use of prior decisions not only has validity but positive value.

Take the matter of wage reopenings. Such a clause usually provides that at stated intervals either party may reopen the matter of wages and, on failure to agree, the question shall be disposed of through arbitration.

The operation of a provision of this kind involves two subsidiary issues.

First, what is included within the word "wages"? Is it limited to going wage rates or does it include the scale of minimum rates as well? And, to what extent may the union under a "wage" reopening clause bring in matters which bear on "take-home" pay and other economic benefits, as, for example, premium pay, bonus arrangements, welfare and pension plans?

Secondly, what are the factors which can legitimately be considered on a reopening? Does a reopening permit a general renegotiation of wages? Or, is reopening a limited proceeding designed to do no more than to keep the stipulated wage rates adjusted to shifting economic conditions so that the standards as agreed to by the parties may be maintained for the life of their collective agreement, neither lowered nor improved?

Different arbitrators have ruled differently on these questions depending on their personal views as to the purpose and function of a wage reopening clause. Such a result is not desirable. It creates uncertainty for the parties and an extreme hazard. It often leads to defeating their intent in agreeing to a wage reopening with a resultant reaction against the arbitration process as capricious, haphazard, and untrustworthy.

Here is a place where uniformity of interpretation would make for confidence and stability. If the scope of a wage reopening clause were to be settled on the basis of a line of precedents, the parties could agree to such a clause knowing in advance the nature of the obligation they were undertaking and the degree of the risk they were running.

Many arbitrations have been held over the question whether holi-

day pay is due when the holiday falls on a Saturday, a Sunday or some other day when the plant is normally shut down irrespective of the holiday. Arbitrators have ruled both ways. Parties cannot be sure what their rights are. It will depend on the particular person who is selected to make the decision.

There is neither reason nor justification for diversity on this question. It can well be settled by a general principle universally applicable. It makes little difference whether it is settled one way or the other so long as the rule is fixed and followed uniformly. Once that is done, parties and their counsel will know how to guide themselves and they can enter upon agreements with assurance that on this point at any rate their intentions will not be frustrated.

Or, take a new kind of dispute which is beginning to arise. The collective agreement declares that there shall be no discharge except for just cause. It is silent on the question of retirement for old age. The company institutes a rule that it will retire all workers reaching the age of sixty-five, irrespective of physical capability to continue to do the required work. Is the retirement of a worker under this rule a "discharge" within the meaning of the agreement so that it can be made subject of grievance and arbitration? If so, is old-age "good cause"? These are issues obviously of major importance to both sides. Also, they are issues which can be successfully dealt with through principles having general applicability.

With increasing frequency we find the same provisions appearing in collective agreement after collective agreement, sometimes with only insubstantial changes in wording and often with none at all. The parties by this practice give evidence that there are areas in which uniformity and standardization are not only possible but desirable. This development should not be frustrated by diversity in interpretation and application resulting from differences in the views and attitudes of arbitrators.

To the degree that we can give in advance understanding and certainty as to the commitments which are being undertaken, we strengthen the collective agreement as an instrument for ordering and stabilizing labor relations. To the extent that we are able to free the operation of the agreement from the personality of the arbitrator, we reduce the incentive for shopping around in the selection of arbitrators. Those who are critical of labor arbitration, and not without much reason, will, on an analysis of their complaints, discover that the root of most of the present deficiencies is the continuous search

carried on by the parties for arbitrators who on the basis of past performance or supposed predilections give promise of a favorable ruling.

---

## Amendments to Arbitration Statutes

**The New York Arbitration Statute** has been amended by Chapter 260 of the Laws of 1951 in adding to the first sentence of sec. 1450 of the Civil Practice Act after the word submission "and to enter judgment on an award thereon." By this amendment, which has taken effect September 1, 1951, an agreement providing for arbitration in the State of New York shall be considered consent of the parties to the jurisdiction of the Supreme Court to enter judgment on the award. Though sec. 1450 provides for such jurisdiction to "enforce" arbitration agreements, some doubt still remained in the absence of an express statutory provision. This all the more since sec. 1450 deals exclusively with an application to compel arbitration, whereas the entry of judgment is dealt with in other sections. The amendment was recommended by the Judicial Council in order to make the jurisdiction for the entry of a judgment on an award definite.

**The New York Emergency Rent Controls Laws** have since their inception provided for the application of the Arbitration Statute (Art. 84, Civil Practice Act, see this *Journal*, 1947, p. 145). An amendment changed the arbitration sections in both Chapters 430 and 431 of the Laws of 1951 to the effect that "any proceeding or independent action to set aside an award made by an arbitrator hereunder shall be begun within ninety days."

**The Legislature of Puerto Rico** approved on May 8, 1951, Act No. 376 to authorize the holding of commercial arbitration proceedings in Puerto Rico. This modern arbitration statute provides for the specific enforcement of future arbitration clauses. It repeals the arbitration provisions of the Spanish Civil Code which were in effect in Puerto Rico. An English translation of the thirty sections of the Act will appear in the next issue of this *Journal*. Copies are available from the American Arbitration Association.

# Arbitration Under the Labor Contract —Its Nature, Function and Use

**Jules J. Justin***

*Member of Faculty, The Management Institute, N. Y. University, and Member of the N. Y. Bar*

## *The Nature of Arbitration*

To some people, arbitration is looked upon as an evil appendage to collective bargaining; to others, as a speculative and haphazard venture. The workings of arbitration seem a mystery to them. Focusing their attention upon the arbitrator, they ignore the objective factors and criteria that make up the arbitral process. Strange as it may seem, the parties themselves, not the arbitrator, make up these criteria and fix the rules. At least, they have the *power* to do so, from which alone flows the arbitrator's *authority*. Instead of properly exercising this power, by default or through negligence, they take refuge in personal criticism.

What this power is and how it may be exercised will be discussed under the following points:

I. The nature of arbitration—i.e. how it comes about, who makes the rules and controls its operation;

II. The function of arbitration under the labor contract, i.e. what purposes it serves and how it operates.

It should be borne in mind that the foregoing points will be discussed primarily in relation to grievances and disputes *arising under a contract,* during its term.

*This article sets forth some of the highlights of Mr. Justin's complete article under the same title, which appeared in *Personnel* vol. 27, p. 286 (1951). It is reprinted here by permission of The American Management Association, publisher of *Personnel.*

As a starting point, let us compare arbitration with court action. Both have long been recognized by law, custom and usage, as parallel systems for dispensing justice. In many respects, both structurally and in matters of substance, the two systems are alike.

Under each system, parties submit an existing dispute to a judge, looking toward a final determination. Under each system the adjudging tribunal is the trier of the facts and the law. Each tribunal is held to the highest degree of integrity and impartiality. A fair hearing, upon reasonable notice, and free from fraud, corruption or undue influence, must be accorded. Full opportunity must be allowed to present one's case and introduce evidence. Each party may examine and cross-examine witnesses. Where the claim or defense is predicated on a contractual right, established principles of contract construction and interpretation are employed. In each system a binding decision is rendered—by the court or the arbitrator. Subject to the rules of the system, the decision is final and enforceable.

These apparent similarities between arbitration and court action, however, have obscured the two basic differences between them. They are:

1. The *voluntary* principle of arbitration which makes it essentially independent of court action; and

2. The *private* nature of arbitration, whereby the parties themselves exercise or retain essential control over their system, as distinct from the public nature of court action.

### *The Voluntary Principle of Arbitration*

Except in a few specific instances, whereby state law arbitration of certain industrial disputes is made compulsory,[1] neither party can compel the other to go to arbitration. In every state, either under the common law or by statute, the parties may, if they mutually agree, forego their right to go to court. They may agree *voluntarily* to go to arbitration instead.

The voluntary agreement of parties to substitute arbitration for court action has long been preserved. Under the common law, the courts refrained from granting specific performance of an agreement

[1] As in certain disputes involving public utilities—Florida, Indiana, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, North Dakota, Pennsylvania, Virginia, Wisconsin.

to arbitrate. This rule still prevails in many states today. The agreement is nonetheless deemed legal, and damages arising from its breach may be sought. Even where the parties began the arbitration, either party could, in the absence of the perpetration of a fraud, withdraw from the proceedings at any stage up to the rendering of the award.

In about half of the states today, a written agreement to submit an *existing* dispute to arbitration is enforceable by the courts.[2] In appropriate cases, specific performance of the agreement to arbitrate will be granted. In others, the attempted court action, that is contrary to the agreement, may be enjoined. In a number of states,[3] a written agreement to submit to arbitration *future* disputes that may arise between the parties during the term of the collective bargaining agreement is also enforceable by the court. The United States Arbitration Statute, on its face, excepts arbitration of labor disputes from the jurisdiction of the Federal Courts. However, recent court interpretations have narrowed this restriction.[4] Today, a party may be stayed from using the Federal Courts to decide a labor dispute if there is a legally binding agreement to go to arbitration, valid in the state whose laws govern the contract or submission agreement.[5] Arbitration as an independent system for dispensing justice is thus recognized and protected.

Since the agreement to arbitrate is a voluntary act of the parties, it may, by their mutual consent, be canceled or voided. Where one party questions the validity of an agreement to go to arbitration, the court may be called upon to decide that issue. If it is found that the parties did not agree to go to arbitration or that the alleged agreement was induced by fraud or coercion, it will not be enforced. The voluntary nature of arbitration is thus safeguarded.

[2] The Bureau of Labor Statistics reports: Where one party does not appear, the decision is not binding in over 40 states and the District of Columbia—*Bulletin 908-16*, footnote page 123. This may be where no prior court application is made to enforce the agreement to arbitrate.

[3] E.g., Florida, California, Connecticut, Louisiana, Massachusetts, New Jersey, New York, Pennsylvania.

[4] See *UOPWA, CIO* v. *Monumental Life Insurance Company*, 88 F. Supp. 602 (U. S. District Court, Eastern District Pennsylvania, 1950).

See also: *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3; *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311, where the Court of Appeals, Third Circuit held the arbitration act did preclude granting a stay of action.

[5] See, however, *Textile Workers Union* v. *Aleo Mfg. Co.*, 15 Labor Arbitration 726, where the U. S. District Court, Middle District of North Carolina, held that a refusal to abide by an award is a "violation of contract" within the meaning of Sec. 301(A) of the Labor-Management Relations Act.

*Scope of Arbitration*

Because going to arbitration is a voluntary act, the parties are at liberty to agree on the substantive matters they wish to arbitrate.

Except where the subject matter contravenes the public policy or law of the jurisdiction, the parties may agree to submit to arbitration:

> any controversy, claim, dispute or grievance of any nature whatsoever;

Or they may limit arbitration to:

> disputes or questions involving the interpretation, application or alleged violation of the agreed-upon provisions of this agreement.

They may make subject to arbitration:

> any acts, conduct or relations, directly or indirectly affecting the Union and the Employer

whether or not they are covered by a specific clause or condition in their agreement.

The parties may voluntarily submit to the arbitrator the question whether:

> any dispute or claim is or is not arbitrable

under the contract.

They may submit to arbitration their differences or disputes concerning:

> new terms of wages, hours and working conditions

for a first or renewal contract.

The scope of the matters submitted to arbitration may be as broad as the parties voluntarily wish. In them reside the *legislative power*: (1) to make arbitration *available* under the collective bargaining agreement; (2) to enact the *kind* and *scope* of the arbitration system they want; and (3) to retain, exercise or delegate *essential control* over their arbitral system.

The extent to which the parties exercise their legislative powers, by their contract, determines the arbitration system they get. The extent to which they retain or delegate, by their contract, control over their arbitration system determines the nature of their system.

These are the factors which materially distinguish arbitration from court action; these are the factors which make arbitration essentially independent of court action. The private nature of their system depends upon how the parties implement these factors. Let us see how this can be done.

### *The Private Nature of the Arbitral Process*

Akin to sovereign entities, the essential *power of control* over their own arbitral system resides in the contracting parties. How their system shall function, who shall serve as arbitrator, and what authority the arbitrator shall have, are matters which the parties themselves can set. In these respects, management and labor are their own lawmakers.

The extent to which they mutually agree to exercise or fail to exercise this *power* determines, in the last analysis, the nature of their system. It determines also the role of the arbitrator under their contract. The arbitrator serves in the capacity agreed upon in advance by the parties. His jurisdiction is limited to that which the parties grant. He functions within the prescribed limits that the parties designate in their agreement.[6] The responsibility, therefore, for properly establishing the arbitral process and the authority of the arbitrator rests, in the first instance, squarely upon the parties themselves. When, by default or through negligence, they fail to meet this responsibility, the prevailing law of the jurisdiction comes into play.

### *Alternatives Under the Collective Contract*

Here are some of the things the parties may do by their collective bargaining contract:

Determine the type of the arbitration tribunal (single, tri-partite, multiple); the number of arbitrators (one, three, five or an even number); their method of appointment (mutual designation, appointing agency); the arbitrator's qualifications (business, professional); and the methods for substitution and filling of vacancies (private agency, court).

[6] See J. Noble Braden, "The Function of the Arbitrator in Labor-Management Disputes", this *Journal* vol. 4, p. 35 (1949), and *Code of Ethics and Procedural Standards for Labor-Management Arbitration*, published by the Bernheimer Arbitration Education Fund and available from the American Arbitration Association.

The parties may stipulate the arbitrator's term of office (permanent, *ad hoc*); the limits and extent of his authority and jurisdiction (interpretation or application of agreed upon provisions, broad or restricted equity authority, new contract terms); the conditions governing the functioning of the tribunal (notice, issuance of subpoenas, where permitted by law; interim consultation, personal inspection, reconvening after award); and conduct of the hearings (oral testimony, swearing in of witnesses, production of records, submission of written briefs).

The parties may exercise control over the availability of arbitration by imposing conditions precedent (prior notice in writing, compliance with prior steps in grievance procedure); and establish time limitations (for demanding arbitration, for rendering the award).

Rules of evidence and procedure, set forth in the contract or adopted by reference, are binding and must be complied with, unless mutually waived. By the contract, oral hearings may be dispensed with and other methods of presentation of proof may be pursued.

Criteria and objective standards of proof (cost-of-living index, prevailing industry or area practice, plant rules, disciplinary schedules, contract wage level) may be established which the arbitrator is required to observe.

Conditions governing the rendition of the award (unanimous, majority vote); its scope and nature (tentative, partial); its effect (final, binding, advisory, appealable); and its enforceability (injunctive, court judgment) may be prescribed. The post-operative jurisdiction of the tribunal (continuing, terminated [*functus officio*], reconvening) may be established, and the use of precedents and prior awards may be accepted or enjoined.

These and countless other variations of the arbitral process are available to the free choice of parties under the labor contract. By their free choice, they can use arbitration, instead of court action or economic force. By their free choice, they set up and operate their own private, quasi-judicial system to resolve their disputes and dispense justice under the contract.

The rules and regulations of their system must be clearly and with certainty set forth in the contract. Otherwise, or in the absence of such particulars, the arbitration process is governed by the rules of the common law or applicable statutory law or a mixture of both.[7]

[7] See the author's "Arbitration: Preparing Your Case," and "Arbitration: Presenting Your Case," in PERSONNEL, Vol. 24, pp. 201, 261 (1948).

Frequently, the parties fail to exercise their power to detail the metes and bounds of their system.[8] Sometimes they carelessly exercise them—or innocently acquiesce in their extension, without taking into account the result. Such errors of omission or commission are directly chargeable to the parties. It is their responsibility in the first instance to agree upon the kind of arbitral system they want and the authority and jurisdiction of the arbitrator thereunder. If by their contract or by the arbitration clause, more authority or greater jurisdiction is given the arbitrator than one of the parties intends, and later realizes, the fault belongs to that party. Its error is not chargeable to the arbitrator.

This, then, is something of the *nature* of the arbitral process—how it comes about and who makes the rules and controls its operation.

Our second point of inquiry is: an understanding of the *function* of arbitration under the labor contract, i.e. what purposes it serves and how it operates or may be made to operate.

### *The Function of Arbitration Under the Labor Contract*

There are two fundamental purposes that arbitration serves under the labor contract:

(1) It assures *fulfillment* of the goal of management and labor to *self-regulate* their every-day relationship; and

(2) It assures the *continuity of relationship* between management and labor, implicit in the collective bargaining contract—a continuity that is necessary under our modern industrial setup.

Each of these objectives—self-regulation and continuity of the management-labor relationship—is an integral part of the collective bargaining process. Each complements the other; the realization of one assures the realization of the other.

Arbitration is not a part of collective bargaining. It is ***adjunct*** to collective bargaining—that is, arbitration is connected with, but is

[8] A practical safeguard to cover the operation of the arbitration tribunal is available by adopting, by reference in the contract, the rules of procedure of an established organization, such as the American Arbitration Association. This, however, does not obviate the necessity for carefully formulating the arbitration clause.

independent of, collective bargaining. Arbitration is a means which helps the parties achieve the foregoing objectives. When the process of collective bargaining falls down, arbitration is resorted to in place of court action or the use of economic power. Sometimes arbitration is used as a substitute for collective bargaining—for example, in some forms of "impartial chairman" setups. More often, arbitration is used as the parties' own "quasi-judicial" system to resolve their differences and dispense justice.

*Arbitration and the Goal of Self-Regulation*

The parties start self-regulating their affairs from the day they start negotiations for a first contract. Of course, even without a contract or without any union organization, employer and employees self-regulate their affairs from the first day of plant operation.

The more formal procedure begins with the setting up of grievance machinery under the labor contract. Through the steps of the grievance machinery, the day-to-day problems are discussed and ironed out. They may concern such varied subjects as adjusting piece rates for new operations, promoting employees to higher rated jobs, maintaining production standards, and enforcing plant rules and employee discipline.

The grievance procedure allows the parties to self-regulate their affairs. If they adjust their differences, the dispute is disposed of. If not, the dispute may go to the final or terminal step—arbitration.

*Self-Regulation—And What It Implies*

The principle of self-regulation is, in effect, extended through arbitration as the final step. As pointed out above, arbitration is not something "imposed" on the parties. It is voluntarily adopted. The parties have exercised their free choice to set up their own "quasi-judicial" system, make the rules, appoint their arbitrator, and control the operation of their system. Although the arbitrator functions "independently" of the parties, his act serves to assure fulfillment of the ultimate goal—self-regulation.

There is a basic difference, however, between the functioning of the grievance machinery and the functioning of arbitration; between the parties' act of *adjusting* the dispute in the grievance procedure and the arbitrator's act of *deciding* the dispute.

In their own attempts to adjust the dispute, the company and the

union are free to make all kinds of "necessary compromises." These compromises may be of a temporary or permanent nature. They may or may not be worked out within the framework of the existing contract and the agreed upon clauses therein. As compromises, they must be acceptable to each party—otherwise, the dispute will not be settled. The settlement may be contrary to a previously agreed upon contract clause; or it may fill in a subject matter that had previously been omitted or negotiated out. The parties need not work, necessarily, within the framework of the contract. They may work within the larger framework of the legitimate spheres of interest of each party.

In this sense, the parties are free "to legislate" upon the dispute. Their agreement or disposition of the dispute need not be a "judicial" act. It may be, and the parties even may follow the form of judicial inquiry in their discussions. In this sense, the parties' act in adjusting the dispute in the grievance procedure continues the process of collective bargaining.

Arbitration is not a continuation of the process of collective bargaining. Generally, the arbitrator has no authority to legislate on matters not covered by the contract. Often the contract, specifically or by implication, forbids him to do so. Of course, the parties may, if they voluntarily agree, give the arbitrator such authority. Thus, in deciding disputes under a "reopening clause" or in cases involving new terms for a renewal contract, the arbitrator may specifically be given the power to do what the parties themselves, through collective bargaining, do.

In the absence of such authority, given by specific consent or implicit in the contract, the arbitrator is constrained to reach his decision within the framework of the existing contract. The claim or the relief sought should be referable to an agreed-upon contract clause. Otherwise, the dispute may be considered beyond the arbitrator's jurisdiction.

### *A Common Misunderstanding*

Much of the criticism directed toward arbitrators and arbitration today originates from a misunderstanding of the function of the arbitrator and how he operates under varying contracts. Such misunderstanding leads to the oft-repeated charge that the arbitrator "compromises" a case; or that he "splits down the middle"; or that he "acts as an industrial statesman," trying to make both parties happy

with his award. Some critics even say that the arbitrator "balances" the number of his awards—one for the union, then one for the company, and so forth, irrespective of the merits of each case. And to get a laugh from a sympathetic audience, these same critics will say that the arbitrator, in one case, gives the award to the union and the accompanying opinion to the company—or vice versa.

If an arbitrator purposefully does these things, then the criticism is warranted. The parties have it within their power to restrain such misdeeds. I suggest, however, that in most cases what is charged as a "compromise" or "split decision," is in fact quite the contrary. Rather, that the arbitrator's award, falling somewhere between what the union sought and what the company claimed, was within the "area of probable expectancy."

Take, for example, a dispute involving a claim of intra-plant rate inequity. The union claims that a new job has not been properly slotted in the wage structure. The union says the new job should pay 15 cents more than the company had set for it. The company says that the new job is properly rated and slotted within the established wage structure of the plant, and no adjustment is warranted.

The charge is made the arbitrator "usually" decides this type of case by giving the union half or thereabouts of the amount sought. Implied in this criticism is the claim that the arbitrator should have decided "all or nothing." But why? Must an all-or-nothing decision necessarily be rendered? In some cases, the facts may warrant allowance of the full claim; in others, denial in toto. Yet, in others, the exercise of sound judgment may require that the award be somewhere between what the union says it should be and what the company claims. One must look to the full evidence submitted by the parties and to the objective standards they relied upon, to see the basis for the decision. To characterize as a "compromise decision" one that falls somewhere between what each party claims, just because it does so fall, is absurd. Yet, I submit, many of the arbitrator's awards that are labeled "compromises" are of this type.

Sometimes the criticism directed towards the arbitrator's award arises from a misunderstanding of the objective factors or criteria used by arbitrators in deciding a case. Take the discharge case under the typical contract clause—"an employee may be discharged for just cause" or "shall not be discharged except for just or proper cause." The decisions in these cases are the ones usually cited by

critics to show that the arbitrator "compromised" his judgment or tried to make both parties "happy" with his award.

The interpretation of a contract provision is not essentially at issue in these cases. Here the arbitrator is a judge and jury seeking to determine if an employee committed the wrong complained of and if the company had "just" cause for his discharge.

*The Arbitrator's Function in Disciplinary Cases*

Now, there are two schools of thought as to how the arbitrator should function in disciplinary cases. One school holds that in the absence of any qualifying contract provision or facts showing a contrary intent, the arbitrator must be satisfied on three points:

(1) That the employee was guilty of the charge—that he committed the offense complained of;

(2) That punishment was warranted under the circumstances; and

(3) That the degree of punishment imposed—say discharge—was just and proper, i.e. that the "penalty fitted the crime."

The last consideration, says this school, is just as much a part of "just cause" under the contract as are the first two. A punishment that fits the crime is equally a part of "just cause" and must be proved to the arbitrator's satisfaction.

Thus, in a number of discharge cases, arbitrators have reinstated an employee, without back pay, or modified in some other form the penalty of discharge. In other disciplinary cases, arbitrators have, in various ways, reduced the penalty imposed by management.

It doesn't follow, however, that in these cases, the arbitrator has "compromised" the case or his judgment. Neither can it be correctly said that he has tried to act as an "industrial statesman," making both parties happy with an award that he thinks will be "mutually acceptable" to them. Rather, he has acted under the above-stated three criteria. He has, in effect, judged that the disciplinary action taken, including the degree of penalty imposed, was not for "just cause." The offense, the facts and circumstances under which the offense was committed, and the degree of penalty imposed —all these did not add up to or prove "just cause" on management's part.

In such a case, the arbitrator has unquestionably substituted his judgment for that of management. He has determined the degree of penalty that, in his judgment, the offense warranted. But if, in the absence of other agreed upon criteria, or by acquiescence, the parties permit him to act under these three criteria, he is acting within his authority. Under these circumstances, he has not, as such, "compromised" the case or "split" his decision. Of course, if the parties do not want the arbitrator to act under these three criteria, they have the power to so instruct him. Theirs is the responsibility to exercise this power, and not leave it to guess-work or the individual arbitrator's choice.

The other "school" maintains that the arbitrator does not have the authority to substitute his judgment, as to the degree of penalty imposed, for that of management. They say that under the typical discharge clause cited above, only the first two criteria—whether the wrong was committed and whether punishment was warranted—are the only relevant subjects of inquiry. They are the only subjects over which the arbitrator has been given authority to act.

The nature of the punishment, or the degree of the penalty, they say, is not part of "just cause" under the contract. Thus, it is contended, if the arbitrator finds that the employee committed the wrong complained of, and he was disciplined for that wrong, the action of management must be sustained, whatever the penalty was. Neither the union nor the employee can then be heard to complain. The arbitrator's action in changing the penalty constitutes, under this position, an abuse or usurpation of authority, not given by the contract.

In these opposite positions, we find revealed the source of misunderstanding of the arbitrator's function in disciplinary and discharge cases. Each position has points of merit, and a good case can be made out to support each one.

*Study of Awards in Discipline Cases*

A recent study of arbitrators' actions in disciplinary and discharge cases, was made by Professor J. M. Porter, Jr.[9]

Professor Porter's study covered nearly 200 reported awards. He found that in

[9] Professor of Psychology, Rensselaer Polytechnic Institute. Paper presented at the Proceedings of the Second Annual Meeting of Industrial Relations Research Association, 1949.

> . . . 74 cases, which represents 38 per cent of the total number studied, the arbitrator's award sustained the disciplinary action taken by management. In the remainder of the cases studied, 121, which was 62 per cent of the total, the effect of the arbitrator's award was to either revoke or modify the discipline imposed by management. In this latter group of cases, the effect of the award was to completely revoke management's action in 49 per cent of the instances and to modify (i.e. reduce in severity) the discipline in 51 per cent of the instances.

The report further stated:

> Where the original discipline had taken the form of a suspension (24 cases) the arbitrator's decision sustained the action taken in two-thirds of the instances. Where the original discipline imposed had been the discharge of the employee (170 cases) the arbitrator's award sustained the action in 34 per cent of the cases.

*Some Implications of the Study*

Though the study showed "that discharge is the form of discipline most frequently resorted to by management," Professor Porter was careful to point out that the "data were gathered from disputes which had been taken to arbitration and such findings may merely mean that unions are more apt to press discharge cases to arbitration than lesser forms of discipline."

Where management imposes a disciplinary punishment short of discharge, unions are less prone to test out the propriety of the company's action. As Professor Porter points out: "When suspension, rather than discharge is involved, the awards sustain management's action two to one."

*Summary*

The parties have the power to regulate their own affairs. They do this by adjusting their differences through the grievance machinery of their contract. If they don't succeed, they generally use arbitration that they have voluntarily set up.

Arbitration does not lessen the parties' power to self-regulate their affairs. Although the arbitrator acts "independently," his act does

not take away any of their "power." He acts within the authority and jurisdiction conferred upon him by the parties. In the absence of specific restrictions of authority, the arbitrator acts according to prevailing rules of arbitration law and accepted practice and custom of the ever-growing "common law of industrial relations." Instead of resorting to court action or the test of economic strength, the parties use arbitration to reach their goal of complete self-regulation of their affairs.

Where this goal is not realized, the fault is usually found in a misunderstanding of the function of arbitration and a misunderstanding of how the arbitrator operates. Critical analyses of the function of arbitration and arbitrators, aided by experience, should help in clearing up part, at least, of this misunderstanding.

# Arbitration's Role in Inter-American Trade Contracts

**Sidney Braufman**

*Executive Secretary, Inter-American Commercial Arbitration Commission*

The extremely cordial and mutually beneficial relationship traditionally existing between the American Republics is unique, especially in view of their widely divergent ethnic, cultural, and economic backgrounds. Based not on fear and intimidation, from time immemorial the prime instruments of imperialism, but rather on good faith and voluntary cooperation, this relationship sets a high example for the rest of the world to follow. And in these perilous times logic dictates that nothing ought to be permitted to undermine it.

Aware of the serious threat to international commercial and political relations posed by unresolved foreign trade disputes, the twenty-one American Republics, at their Seventh International Conference in 1933, adopted Resolution XLI by virtue of which the Inter-American Commercial Arbitration Commission was created. Since then, the Commission has been instrumental in removing literally thousands of disputes from inter-American trade—disputes involving a wide range of raw materials and manufactured goods running the gamut from carnauba wax and alligator skins to used automobiles and complex business machines.

This record offers abundant proof that a time-tested medium now exists by which the risk attending your inter-American transactions can be greatly minimized, and that medium is arbitration. Arbitration can be provided for either before the dispute arises through the insertion of an appropriate clause into the contract covering your transaction, or afterwards, by mutual agreement of the parties. Which method is preferable? The Commission recommends the former; for obviously it is much easier to "sell" arbitration when your contract is being negotiated and good will is at its apogee than afterwards when controversy has begun to strain relations.

Here is the text of the standard arbitration clause developed by the Commission and endorsed by numerous private and government agencies engaged in inter-American affairs:

> Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in (Place)

The following typical arbitration case arising out of Brazilian-American trade was administered by this Commission several months ago. In his Demand for Arbitration filed under the preceding clause, the claimant, a New York importer, alleged that a shipment of 1,500 dry-salted Paraiba hides which he had bought from a Brazilian exporter was "damaged, tainted, and rotten." Accordingly, he requested an award directing an allowance of $1,700.00.

The Board of Arbitrators, comprising three impartial experts selected by the parties from the Hides Section of the Inter-American Panel, first presided over a brief hearing at which the disputants set forth their respective contentions. Then, in the presence of the parties, they proceeded to the warehouse and examined the contents of a representative number of bales. Finding approximately 40% of the skins to be defective, the arbitrators, shortly thereafter, awarded the buyer damages totaling $1,550.00

This case graphically illustrates the major attributes of arbitration —speed, economy, and justice. The Commission, for instance, received the buyer's Demand for Arbitration on April 2nd. Two days later, on April 4th, he and the New York representative of the seller agreed on 3 arbitrators from among several suggested by the Commission. The following day a hearing and an inspection were held; and on April 6th, just five days after the filing of the Demand, a final Award was rendered. This is speed!

While it is true that to achieve such prompt action the fullest cooperation of both disputants is indispensable, it should be borne in mind that even where one of the parties balks, arbitration before this Tribunal cannot be unduly delayed. The Rules of Procedure prescribe automatic time limits which insure reasonable speed.

The total cost of the foregoing arbitration to each of the parties was only $25.50. This represents the administrative fee based on 1½% of the amount claimed. No other expenses were incurred because the arbitrator, as is customary under the Rules, served gratuitously. In addition, the parties, as is also usual in cases involving solely quality, were not represented by counsel.

Justice, most businessmen will agree, can best be served in commercial disputes through an informal proceeding before a "judge" thoroughly conversant with the issues whose efforts to find a fair solution are not obstructed by onerous legal technicalities. Arbitration meets these requirements.

Every year a substantial number of the cases filed with the Inter-American Commission never reach the arbitrators, the parties having achieved an amicable settlement prior to the first hearing. This fact is significant, for it demonstrates a fundamental principle of arbitration: that the mere presence of an enforceable arbitration clause in a contract frequently in and of itself obviates the necessity for recourse to formal arbitration.

Is this concept valid? Our case records and those of other arbitration organizations show that it is. For, isn't it plain logic that where each of the parties to a dispute knows that in the event of an impasse speedy arbitration is available, neither one is likely to assume an arbitrary stand? Thus, the achievement of a reasonable, friendly settlement is greatly facilitated. That this dispute-deterrent feature of arbitration has always been one of the most compelling reasons behind the widespread use of arbitration clauses in foreign trade is readily understandable.

In each of the foregoing cases the aggrieved party had the benefit of a sound arbitration clause and, consequently, was in a position to initiate arbitration unilaterally. This, of course, meant that the function of the Commission was restricted almost exclusively to administrative detail. But, where such a clause is absent, the task of the Commission in a trade dispute is far more difficult: how to arrange an amicable settlement, and if that proves impossible, how to obtain the consent of the alleged defaulting party to submit to formal arbitration.

Take this case for example. In May of 1948 a prominent chemical firm with headquarters in Sao Paulo bought 275 metric tons of potassium muriate from a New York export house. When the shipment arrived in Santos, the buyer found that it was partially

damaged, a large number of containers having burst open. This discovery led to the filing of a claim for damages totaling $627.00 on the ground that the potassium muriate had been placed in defective containers. The seller, of course, denied this. An impasse resulted.

The years 1948, 1949, 1950, and part of 1951 passed—nothing, it seemed, could break the deadlock. Finally, the buyer referred its complaint to the Brazilian Government Trade Bureau in New York, which agency as it had done on so many previous occasions, routed it to the Inter-American Commercial Arbitration Commission.

Following its regular procedure, the Commission immediately communicated with all the parties concerned, the claimant, the seller, the insurance broker, and the insurance company; and after several exchanges of correspondence succeeded in clarifying the issues to such an extent that the New York firm voluntarily agreed to pay the buyer's claim in full. And that occured even before the point was reached in the negotiations where the Commission usually recommends arbitration.

Another adjustment case administered by the Commission involved an over-due draft for $800.00 which had been accepted by the buyer, a Venezuelan firm, twelve months previously for payment in thirty days. Before submitting this claim to the Commission the seller, a prominent Detroit automotive parts supplier, had referred it to several private and government agencies, but to no avail; the respondent simply refused to cooperate.

The work of the Commission in each of the Latin-American Republics is carried on through a National Committee comprising leading figures in business and the professions who espouse the principle of arbitration and who actively participate in the tribunal and promotional activities of the Commission in their respective communities.

Accordingly, the Commission referred the foregoing claim to the Chairman of the Venezuelan National Committee, Dr. Vicente Lecuna, who is also President of the Banco de Venezuela. He promptly arranged a conference with the buyer for a discussion of the issues in dispute. And six weeks later the American firm received its money.

How was this accomplished you might ask, especially in view of the failure of the other agencies? We can best answer by posing the following question: If you were approached on behalf of this

Commission in a similar situation by one of the leading members of your business community, would you not give special consideration to his request for cooperation? And that is precisely how the buyer in this case reacted. While this type of moral suasion, the chief weapon of the Commission in its fight against controversy, has been effective in a majority of the complaints received, far too many disputes, despite our efforts, have remained unsettled, festering dangerously on inter-American trade and relations.

When it becomes apparent that the settlement efforts of the Commission will not be productive of results, arbitration is urged. Almost invariably, our records show, the claimant will accept this recommendation; all too frequently, the alleged defaulting party will not. When this happens, the injured party if he wishes to press his claim has, for all practical purposes, only one alternative—action in a foreign court—which course is usually rejected because of the time and prohibitive costs entailed.

This dilemma makes the wisdom of protecting all transactions by a sound arbitration clause strikingly clear. For if the preceding disputes had arisen out of contracts containing such a clause, the aggrieved firms could have initiated arbitration as a matter of right without first having to obtain the consent of the respondents.

It has been the experience of the Commission that some American firms are reluctant to suggest the use of an arbitration clause for fear of offending or arousing suspicion. Nothing can be further from the truth. When you insert an arbitration clause in your contract you do not offend or create suspicion. On the contrary, you build good will and confidence by saying in effect to the other party that unresolved controversy will not be permitted to imperil your relationship, but rather will be submitted to speedy arbitration for a final and binding decision. Used since earliest times, an arbitration clause continues to be the best way—the modern way—to demonstrate one's good faith and also to obtain maximum protection against the hazards of international trade, particularly in these days of uncertain supply and fluctuating prices.

Arbitration clauses providing against future disputes are not specifically enforceable in a number of the Latin-American Republics. This applies even to the standard clause of the Commission. Nevertheless, incorporation of a sound arbitration clause into all your contracts is strongly urged not only by this organization, but by the Inter-American Council of Commerce and Production, the Inter-

American Bar Association, and the National Foreign Trade Council as well. For we all have learned through first-hand experience that even where enforcement is not provided for, the good faith inherent in the use of such a clause predisposes parties to its observance in the vast majority of cases.

Safeguard your shipments! Help preserve and strengthen the excellent commercial and political relations existing between the Latin-American Republics and the United States! Use a sound arbitration clause in all your contracts covering inter-American trade!

---

### *Commercial Arbitration in India*

*Capital,* the leading trade publication in Calcutta, carried in its first issue of September 1951, the following note: "The government of India has for some time past been considering the need for suitable arbitration procedure in respect of India's trade with other countries. Arbitration facilities are available in some countries like the United States of America, Canada and the United Kingdom. As these facilities, however, do not always provide a ready means of settling disputes in which Indian trades are involved, the Government of India has decided to convene a conference at New Delhi to discuss this question with Chambers of Commerce and other commercial interests concerned. Among the specific questions for consideration of the conference will be:

1. The facilities which exist at present in India for the settlement of trade disputes between trades in India and those abroad.
2. The steps that should be taken to keep such trade disputes to the minimum.
3. The extent to which the existing facilities for arbitration can be supplemented by the setting up of an All-India Arbitration Board.
4. The constitution of this Board and the manner in which it would be worked so as to ensure smooth running and achieve reciprocity with similar arbitration bodies abroad."

# Colombia Enforces New York Judgment Entered Upon Arbitral Award

The Republic of Colombia has, as the only Latin American Republic, enacted an arbitration statute which provides for the enforcement of future arbitration clauses (Law No. 2 of February 25, 1938 *Diario Oficial*, Ano 74, Numero 23727 of March 12, 1938, p. 888, translated in *International Arbitration Journal*, 1945, p. 212).

More recently, its Treaty of Friendship, Commerce and Navigation with the United States of April 26, 1951 contains a provision for the enforcement of commercial arbitration agreements between nationals and companies of both countries and for the execution of awards rendered in arbitration proceedings. This is in conformity with the recent decision of the Supreme Court of Justice of Colombia, of October 26, 1950, in *Hide Trading Corporation, Inc.* v. *Field Echenique Compañia Ltda., Gaceta Judicial*, Tomo 68, Numero 2087-88, p. 139, of which a translation is as follows:

EXECUTION OF FOREIGN DECISIONS—REQUIREMENTS FOR ENFORCEMENT—CONSULS OF THE REPUBLIC PERFORM THE FUNCTIONS OF NOTARY IN THE PLACE OF THEIR JURISDICTION.

1. There are three requirements which, according to the laws of the Republic of Colombia, must be fulfilled in order that a foreign judgment be enforced in the country:

   First, it must be rendered as a result of a personal action.

   Second, it must not affect the national jurisdiction nor must it be contrary to public order and good mores (costumbres).

   Third, the judgment must be in conformity with the laws of the country in which it was rendered, as well as with Art. 657 of the Judicial Code.

2. Law 23 of May 1, 1886, on the organization of the diplomatic and consular service, attributes the function of a notary to the Consuls in the place of their jurisdiction.

Supreme Court of Justice—Court of Civil Cassation—Bogota, October 26, 1950
(Presiding Judge: Dr. Manuel Jose Vargas)

Hide Trading Corporation, Inc., domiciled in and established in accordance with the laws of the State of New York, initiated a demand against Field

Echenique Compañia Ltda. of Barranquilla, Colombia. Field Echenique Compañia Ltda., now wishes to be advised whether the arbitration award duly confirmed by the Supreme Court of New York on May 17, 1948, which obligated them to pay a certain sum to Hide Trading Corporation, is enforceable in Colombia.

The following documents were attached to the petition:

a) A special power of attorney executed for the transaction in question by the claimant before the Consul General of Colombia in New York, which was duly certified by the Colombian Department of Foreign Affairs.

b) Two statements of lawyers practicing in the State of New York which affirm that the arbitration award rendered between the parties, as well as the judgment based on the arbitrators' decision as a result of an agreement between the parties accepting arbitration in accordance with the laws of said State; and which declares that it was a personal action (distinct from an action against real property), and that the procedural provisions of the State of New York do not prohibit compliance with foreign judicial decrees, and that judgments rendered by competent tribunals can be executed in the State of New York and are given the same effect against the judgment-debtor; and, finally, that according to the laws in question, an arbitration award obtained in accordance with the arbitration law (Art. 84 of the Civil Practice Act of the State of New York) can be confirmed by the court and will have the same force and effect, in every sense, as if it were obtained in a judicial action, and on the same basis its execution can be obtained; that a judgment of a Colombian judge may be utilized as a basis for an action and execution within the said State of New York, provided that it be duly authenticated.

c) The time during which the respondents were able to attack the award expired many months ago, and in accordance with the law of the State of New York, no new appeal can be instituted. Therefore, the judgment obtained in this action is final and valid, pursuant to the provisions of the law of the State of New York.

d) A copy of the award rendered stating that Field Echenique Compañia, Ltda. shall pay to Hide Trading Corporation Inc. the sum, in pesos, of US$1,469.63, which was decreed in favor of the claimant.

e) Certification of the Chamber of Commerce of Barranquilla as to the existence of the respondent and the designation of their representative.

The Agent of the Public Ministry stated that "the demand and the accompanying documents fulfilled the requirements of Art. 557 of the Judicial Code, and as a result, the execution of the judgment cannot be opposed."

Field Echenique Compañia, Ltda., represented by a lawyer, contested the allegations by asserting that enforcement should not be decreed because the claimant did not have, in their opinion, accredited representation before the Court inasmuch as the proceedings were not in compliance with Law 10 of 1943 regarding legal protocol for the countries of the Pan-American Union, because

the Court of New York does not recognize awards made in Colombia—that is, there is no reciprocal legislation—an essential condition of Art. 555 of the Judicial Code, and finally, the judgment was rendered in violation of a constitutional law because the direct representative of Field Echenique Compañia, Ltda. was not present, but his place was taken by someone who did not have his powers.

It must be considered that:

There are three requirements which, according to the laws of Colombia, must be fulfilled in order that a foreign judgment be enforced in the country:

First, it must be delivered as a result of a personal action.

Second, it must not affect the national jurisdiction, nor must it be contrary to public order and good mores (costumbres).

Third, the judgment must be in conformity with the laws of the country in which it was rendered, as well as with Art. 657 of the Judicial Code.

In the opinion of the Court, the sentence delivered in the State of New York, whose enforcement is requested today, was an exercise of personal action as demonstrated by the testimony presented to this effect.

An award, requiring a Colombian party to pay a sum of money, upheld in the country in which it was rendered, and which is not in conflict with the laws of this country, can be enforced since both parties accepted arbitration in New York.

In the sworn statement of the American lawyers, it is stated that there is no recourse whatsoever to the decision as it was made in conformity with the laws of the country in which it was rendered.

The existence of the claimant and their representative is attested to by the Registrar of the City of New York, duly legalized (Art. 3 and Law 40 of 1907 and Law 232, Decree No. 2521 of July 1950).

Also, the copy of the award, the accompanying documents, the conformity with the foreign law and the verification of the existence of the claimant were certified in the prescribed form as in Art. 657 of the Judicial Code.

Field Echenique Compañia, Ltda. did not prove that the person who acted in their name did not have the power to represent them.

Law 10 of 1943 mentioned above, only applies to legalization of a document before a foreign authority, and since the document was notarized by the Colombian Consul in New York, the aforementioned law does not apply in this case. According to Law 23 of May 1, 1866, Art. 36, the Consul Generals, Consuls, and Vice Consuls have the power of Notary Public—Art. 63. This power is recognized by the Colombian Department of Foreign Affairs whenever authentic signatures appear on notarized documents.

RESOLUTION

**In view of the preceding, the Supreme Court of Justice, Chamber of Civil Cassation, resolves that it can give force in Colombia to the judgment rendered on the seventeenth of May, 1948 by the Supreme Court of the State of New York, whereby it directed that Field Echenique Compañia Ltda. of Barranquilla, reimburse to Hide Trading Corporation of New York, the sum of US$1,469.63, to which the present demand is directed.**

---

### *Commercial Treaties with Israel and Greece*

Recent bilateral Treaties of Friendship, Commerce and Navigation, which the United States has concluded with other countries, contain a provision for the enforcement of commercial arbitration agreements between nationals of the respective countries and for the execution of awards. The standard clause of the Treaty with Ireland, of January 21, 1950, and with Colombia of April 26, 1951, appears also in the Treaty with Israel, of August 23, 1951, Article V (2) and reads as follows:

> Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such party.

A somewhat improved provision regarding international commercial arbitration is to be found in the Treaty of Friendship, Commerce and Navigation between the United States and Greece of August 3, 1951, of which Article VI (2) is as follows:

> Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

# Specific Performance of Contracts Through Arbitration

**Howard L. Oleck**

*Assistant Professor of Law, New York Law School*

ONE who is a party to a contract which has been violated by another party to that contract can seek the aid of the courts in two principal ways. He can sue at law for damages, or he can ask the court to order the other party to specifically perform the contract. When money damages will not be adequate relief, he usually will prefer to have the contract specifically enforced. American and British courts will not grant specific performance, on the other hand, unless money damages definitely would not constitute adequate relief in the particular circumstances. And more than that, these courts will grant specific performance only in certain special situations, and not in others. Generally speaking, the courts will grant specific performance of the negative provisions of contracts, but not of the affirmative provisions. That is to say they will enjoin a party from doing what he has agreed, expressly or impliedly, not to do; but they ordinarily will not force a party to do what he has promised to do, especially if the contract requires personal services.[1] The exceptions to this latter rule generally are confined to contracts to sell definite parcels of land, or a certain unique piece of personal property, such as a rare work of art.

Obviously, this narrow limitation of specific relief seems to many business men to be unrealistic and inadequate. When they ask their lawyers why this rule of law is so limited, they are told that this is a rule of the Equity courts, and that Equity cannot issue a decree which requires a series of actions on the part of the defendant. This is because the court would have to supervise such actions, to

[1] Pomeroy, Equity Jurisprudence (5th ed.), Sections 1401-1410. See also 5 Williston, Contracts (rev. ed.), sections 1445-1450 a; and Restatement, Contracts, section 380.

see that they are properly performed, and such continuous supervision usually is deemed to be impracticable.[2] While the courts tend to be considerably more willing to undertake such supervision today than used to be customary, the general rule against the granting of such specific performance still remains effective.[3] The truth of the matter is that the courts, in this respect, are constrained by the dead hand of a tradition that has long outlived its usefulness. It is a result of historical accident in the development of equity courts in medieval England.[4] It developed out of the fear of the then newly growing Equity (Chancery) courts in medieval England that they dared not issue a decree which might turn out to be impossible to enforce.

While the reason for the refusal of the relief of specific performance, as set forth above in somewhat oversimplified terms, may seem sound to many lawyers, it is very little consolation to the baffled and frustrated businessman. The fact still remains that, in many cases, specific performance of the contract is the only truly just and adequate relief, from his point of view. And he expects logical relief when he needs help, not a long, involved historical explanation of why he cannot obtain the help to which he believes he is justly entitled. Even the relatively liberal attitude of the courts in recent years, and their growing tendency to grant specific relief despite the need for protracted supervision, still seems unrealistic and unsatisfactory to the businessman. It still is very doubtful, for example, that any court would specifically enforce a contract requiring the exercise of skill, imagination and industriousness, such as a contract to prepare and conduct an advertising campaign. Rather, the courts probably would grant damages instead, for non-performance, although the ascertainment of the amount of damages would be very difficult. Along this line, for example, the courts usually use the face amount of the contract as the measure of damages in cases of breach by the party who ordered the advertising, because of the difficulty of measuring damages.[5]

[2] Beck v. Allison, 56 N. Y. 366; also Edelen v. Samuels & Co., 126 Ky. 295, 103 S. W. 360.

[3] Oleck, Specific Performance of Builders' Contracts, editorial, N. Y. Law Journal, p. 22, Jan. 3, 1951; and see Pound, 33 Harv. L. R. 420.

[4] Pound, supra, note 3. See also Oleck, Historical Nature of Equity Jurisprudence, 20 Fordham L. R. 23 (1951).

[5] Oleck, Advertising Contracts, N. Y. Law Journal, editorials, June 6, 7, 8, 1948.

In the cases in which the parties to a contract have incorporated in their agreement an arbitration clause, such as that recommended by the American Arbitration Association, the parties have an avenue through which they often can by-pass the roadblock set up by this legal tradition. In this respect, commercial arbitration clearly is more closely attuned to the needs and customs of modern business and commerce than are the courts.[6] In commercial arbitration, the award of specific performance of a contract is not considered to be a form of relief which can be granted only in a very few, special and closely limited situations. The whole approach of arbitration is quite otherwise. It is not overstating the fact to say that capable arbitrators approach a problem with the idea of specific performance in mind as one of the first and foremost solutions to be considered.[7] This does not mean that specific performance necessarily will be awarded by the arbitrator. He, too knows that there are many cases in which such an award would simply be impractical and impracticable, just as Equity courts long have held in very many cases. But he need not think of it as a remedy which can be granted only when damages would be inadequate, and only when certain other special conditions obtain. He can consider it, as do the businessmen concerned, as one of the most likely methods of doing justice, rather than as a mere possible secondary alternative.

Considered as a matter of tactics, there is real, practical advantage in first obtaining an award of specific performance in arbitration, in a proper case, and then having it enforced by the courts, if necessary. Thus the traditional, conditioned-reflex resistance of legal custom to a request for such relief often can be avoided. While the reluctant attitude of the courts in this regard should not be exaggerated, and actually is diminishing rapidly nowadays[8] it is still a consideration of great practical importance. If arbitration smoothes the way in this respect, as it does in so many other respects, it is wasteful of time, effort and money not to utilize it. As its advantages in obtaining specific relief become more widely appreciated it can be expected to become more widely employed for this purpose. If, as one of its side-effects, it hastens the progress of the courts

[6] See Pound, note 3, supra.

[7] Commercial Arbitration Rules, American Arbitration Assn., Rule 42 (as amended to Dec. 1, 1950).

[8] Oleck, note 3, supra; also Gold, corres., N. Y. Law Journal, p. 200, Jan. 17, 1951; and Clark, corres., N. Y. Law Journal, p. 220, Jan. 18, 1951.

and law towards modernizing legal machinery, that too will be a service to commerce and to society.

This line of thought suggests another important possible use of specific performance through arbitration. In cases of insolvency of one of the contracting parties, it is well-known to lawyers that Equity courts often will not grant specific performance of a contract.[9] The party who is insolvent usually cannot claim specific performance, because he cannot pay.[10] An exception to this latter rule is the case of an insolvent party who has assigned the contract before becoming insolvent.[11] But when the party from whom performance is sought is the insolvent, the rights of other creditors must be considered. A large, highly complex body of law has been developed to make certain that the rights of all creditors shall be protected, and that no one creditor shall benefit unfairly, at the expense of the rights of other creditors.[12] In fact, specific performance, as by a delivery or payment, may constitute a preferential or even a fraudulent transfer when made in conjunction with insolvency.[13] Of course, on the other hand, valid pre-existing liens are enforceable despite the intervention of insolvency or even bankruptcy.[14]

It is not intended that this shall be taken to suggest that specific performance through arbitration may be a way to evade the letter or the spirit of state or federal insolvency and bankruptcy (or corporate reorganization) law. But certainly there are many cases in which specific performance through arbitration can help to relieve a hardship, without violating the purpose of the law of debtor-creditor relationships. At the very least, an award of such nature, to a party (who now, incidentally, also is a creditor because the insolvency itself is equivalent to a breach of contract) will tend to clarify his rights, and to make more certain any inchoate lien which he may possess. Whether the courts will enforce such an award, in these circumstances, depends on the facts, and the rights of other creditors.[15] For example, it may be that there are no other considerable claims of creditors to interfere. Or it may actually be

[9] Newman, Effect of Insolvency on Equitable Relief, 13 St. John's L. R. 44; Horack, Insolvency & Specific Performance, 31 Harv. L. R. 702.

[10] Pomeroy, Specific Performance of Contracts (3rd ed.), Sec. 332.

[11] Ibid., citing (note 2), Crosby v. Tooke, 1 My. & K. 431.

[12] For example, the U. S. Bankruptcy Act; U. S. C. A., Title 11; and the New York Debtor & Creditor Law; as well as a vast amount of case law.

[13] Oleck, Creditors' Rights & Remedies, pp. 21-28.

[14] See, for example, Section 60 a of the Bankruptcy Act. Liens valid at law and in being more than 4 months prior to the bankruptcy are not automatically extinguished by the adjudication of bankruptcy.

[15] Horack, note 9, supra; Newman, Note 9, supra; also McClintock, Equity Jurisprudence (2d ed.) 194.

worthwhile to finance such claims if they are not too heavy and if the desirability of specific performance warrants such action. Or no legal insolvency proceedings may be instituted at all. The range of possibilities here is quite wide, and will vary with the particular facts and interests involved.

In any event, it undoubtedly is true that commercial arbitration offers extraordinary convenience and elasticity in obtaining specific performance of contracts. The scope of its value in this area has not been fully explored, and well merits the attention of progressive businessmen and lawyers. While the courts are moving forward in this direction, commercial arbitration already offers the solution to many otherwise insoluble problems of this type.

The fact that arbitrators are not necessarily law trained may seem, at first consideration, to be an advantage in seeking the help of commercial arbitration for the ultimate purpose of obtaining specific performance of a contract. But this idea is misleading, in actuality. The vast majority of practising lawyers long have recognized, and fretted under, the tight limitations of Equity law in this regard. Most of them tend to be much more favorably disposed toward the granting of specific performance in general than the rule of law would seem to indicate. Moreover, they are well aware of the limits to which even an arbitrator may go without rousing the resistance of the court which may be called on to enforce such an award. It therefore is actually desirable to have a law trained arbitrator in such cases. This is true with regard to those trained under the American and British (and thus Canadian, Australian, Indian, and other British derived) systems of law. In Civil Law nations, such as France and other European countries, specific relief is the rule rather than the exception.

It may well be that commercial arbitration may be the means of welding into American and British law the best elements of the highly practical Civil Law philosophy as to specific performance of contracts.

# The Australian Arbitration System—An Analytical Description

**Dr. Mark Perlman**

*Assistant Professor of Economics, University of Hawaii**

> "I feel very profoundly that much of the criticism of courts and many of the blunders of courts have their origin in false conceptions, or at any rate in varying conceptions, of the limits of judicial powers, the essence of the judicial function, the nature of the judicial process." (B. N. Cardozo, *The Growth of the Law,* 1924.)

The Australian Arbitration System is an institution founded over a half century ago and represents one of the longest attempts at governmental regulation of labor matters of the current period. This essay is an analysis of the place of the government in the labor relations picture. In short, we are concerned with the social role of the Court: we are not concerned either with the Court's evolved rules (industrial arbitration "law"), or, with what, in the strictest sense, may be called the economic effects of arbitration.

The federal government in Australia dates from 1901. In its Constitution it provides that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—(1) Trade and commerce with other countries, and . . . among the states," and (35) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state . . ."

These provisions have been interpreted by the Australian High Court (the equivalent of the United States Supreme Court) to

* The author gratefully acknowledges the assistance of the Social Science Research Council whose award of a traveling fellowship made possible a first hand study of the Australian Arbitration System.

mean that under normal conditions the Australian Parliament may not pass legislation directly affecting industrial relations problems but is limited to the setting up of a supervisory semi-independent governmental agency. Thus the Arbitration System, as it has come to be known, not only serves as a "court" but as a legislative steward for the Parliament, and it is the only authorized instrumentality for the regulation of industrial disputes in the federal sphere.

At the present time the Arbitration System handles all unresolved industrial disputes in inter-state industry. Either party can invoke the assistance of the System after a disagreement has become apparent. The officials usually refuse to intervene while a strike or lock-out is in progress. In practice the System actually determines or supervises the wage rates and working conditions in inter-state industry. By and large the Arbitration System works through the unions and the employers' organizations, although in certain special instances it will recognize individual workmen and employers as parties to the proceedings.

Since 1947 in all but the coal and stevedoring industries, the judges have ruled only on those questions which concern all industries: these questions include the national minimum or "basic" wage, the length of the standard work-week, and the amount of annual leave-with-pay given to employees. Questions involving only one industry or a group of related crafts are handled by quasi-independent authorities called "Conciliation Commissioners." There is no avenue of appeal from the rulings of these Commissioners "on the merits" of their awards, but the Arbitration Court will hear arguments on questions involving the interpretation of the law or of the awards. Likewise there is no appeal "on the merits" from the judgments of the Arbitration Court in that special area of issues which it alone handles, although the High Court will listen to appeals based on questions of constitutionality. There are now five judges on the Arbitration Court and they are supposed to enjoy co-equal status with High Court judges. In addition there are about twenty Conciliation Commissioners. To become a judge on the Arbitration Court one must be a member of the bar with at least five years' experience. They are appointed at the present time for life. The Conciliation Commissioners need not have legal training and are appointed for the period up to their sixty-fifth birthday; they may then be reappointed each year until their seventy-seventh birthday.

* * *

The first Arbitration Act was passed in 1904 after prolonged discussions involving the downfall of two Governments.[1] It provided that there be established a separate Arbitration Court, presided over by a President, who would serve a term of seven years. The Prime Minister appointed as its President a sitting judge of the Australian High Court.[2] The first incumbent held office for only a short time, and in 1906, was succeeded by Mr. Justice Higgins who had incorporated the constitutional authorization for the arbitration system and who had played a leading role in the eventual formulation of the Arbitration Act of 1904.

Mr. Justice Higgins was, while not a Labor Party man, a strong advocate of governmental centralism, a heightened standard of living for unskilled labor, and governmentally administered social controls. Because, as we have noted, the High Court held that the Parliament could not constitutionally concern itself with such labor matters as minimum wages, Higgins took the task upon himself, in his capacity as President of the Arbitration Court. His first major decision in 1907 set up the standards for determining the minimum wage for Australian men engaged in inter-state trade.

In this *Harvester Judgment*[3] he ruled that the profits of a firm were not to be a consideration since profits usually were (in his mind) the reward for "above average" management. Second, the minimum living wage, which he termed the Basic Wage, was to be enough to meet "the normal needs of the average employee, regarded as a human being living in a civilized community," and he used as the basis for this determination the budgets of about a half dozen Melbourne housewives. He satisfied himself that 42 shillings a week was the desired figure. Higgins also set up a detailed set of standards for the provision of differentials for skill or responsibility—later this set was expanded to provide for onerousness of jobs. These differentials are called the *marginal wages*.

Higgins' brethren on the High Court dealt rather roughly with the Arbitration Court's rulings and not only refused to grant it full status as a court, but forced him to curtail many of the legislative

[1] By Government, a proper noun, reference is made to the Prime Minister and cabinet.

[2] Thus the President of the Arbitration Court continued to sit as a justice of the High Court. This peculiarity permitted the President of the Arbitration Court to sit on the High Court when the latter body was considering appeals on the constitutionality of the opinions he had delivered from the Arbitration Court bench. Since 1926 the two courts have had separate judges.

[3] 2 Commonwealth Arbitration Reports 1.

prerogatives that he had assumed. For instance they held that a dispute had to exist before he could issue any ruling, and that the ruling was binding only on the parties to the dispute. (Note how this cut down his role as a legislative steward.) They held that the awards which he made had to lie within the boundaries of the disputed terms and that he could not incorporate any proposals which the parties, themselves, had not suggested. And worst of all, they used a technicality as a pretext for deciding that the Court was not a real court at all, and that he could neither interpret his own awards nor punish for contempt those who "insulted" the Arbitration Court's dignity.

In time, through a special act of Parliament, the last of these handicaps was overcome and for about four years, 1926-1930, the Court actually punished those who flaunted it. However many trade unionists resented the judges' powers and in 1930 a bill was passed which suspended most of their punitive authority. The explanation of the reasoning adopted at that time is interesting in that in addition to providing a clue to the concept of legislative stewardship held by men like Higgins, it offers a basis of comparison for a differing concept of labor arbitration held by other judges. To appreciate the significant differences between two concepts, it is necessary to make certain background observations about the Australian culture and to summarize what reasons the Australians have for preferring governmentally controlled (or influenced) industrial relations as opposed to the system practiced in the United States.

Australia is a country where small farming has never gained a strong foothold. The general aridness of the climate has necessitated the expenditure of considerable capital for irrigation for most truck crops. Instead, there has developed a pattern of big farms which, historically speaking, have specialized in the production of wool.

Most of the Australian population has lived in the cities and has not acquired that property-consciousness which is so typical of the American or French small farmer. Instead, the Australian city-dweller has absorbed a form of urban culture which makes him equality-conscious and prone to look to the government for economic relief and for social protection. These two characteristics of equalitarianism and state paternalism have by now become well ingrained on the Australian character.

Because of the lack of economic individualism and probably also

because of the predominantly urban historical influence, this dependence upon the government has acted to strengthen immeasurably the governmental instrument. Thus in the depressed mid-nineties, labor in Australia turned in its search for protection toward political rather than purely economic action. And within ten years the Labor Party was responsible for forming a Government.

The Labor Party was, and still is, composed of many factions. Traditionally it derives its leadership from the trade unions. The effect of having to serve as a leadership reservoir has had some adverse as well as beneficial results on the trade unions. For one thing, ambitious, able, and successful trade union leaders often "are graduated" to Party leadership and soon abandon their close connections with the trade unions, themselves.

Also, the trade unionists have been able to get unusually favorable legislation enacted, and they have become prone to depend upon their political power rather than their economic power. The various Arbitration Acts have greatly enhanced the size and scope of unionism in Australia: in fact, so much has the foregoing been the case that many unions appear to Americans to have too many divergent factions to permit them to maneuver effectively in the economic sphere. The few hard-hitting or militant unions, which are not subject to this criticism, tend to have leaders who for extraneous reasons are not tempted into political careers and the abandonment of their purely trade union posts. Some of these men are Communists and it is their politics which renders them unacceptable to the political Labor Party.

But the great majority of unions are affiliated with the Labor Party and are happy to receive the benefits which the Party has given them in the form of legal enactments. They have come to expect that the duly ordained protection agency, the Arbitration System, will not only be receptive to their needs, but that it will also tend "to carry the ball" for them. For instance, they look to the System to raise wages and to improve working conditions as quickly as possible. On occasion these large unions do not present tightly organized arguments to the authorities, but depend upon the authorities to render their judgments on their own private investigations. There are many reasons why the union positions are amorphous:—lack of skill or training on the part of the leaders and not infrequently an inability to frame arguments that will satisfy the diverse elements within their organizations (e.g., one union

encompassing both piece-rate and time-rate workers has had considerable trouble in deciding whether it preferred long or short work days, since the piece-rate workers tended to prefer longer hours).

On the other hand, many of the employers are engaged in "cut-throat competition" and they distrust their competitors as much as they oppose union demands. These groups, too, look to the government for supervisory control and they have come to appreciate the administrative qualities which the Arbitration System possesses. In short, their desire is that the System fulfill a function of legislative stewardship, since they are willing, in fact often *prefer*, that the officials be given a free hand to render workable decisions, regardless of the procedural customs of regular courts.

Thus, the Arbitration System is seen by these groups as an administrative agency. And in its capacity of legislative stewardship, the System is supposed to develop general as well as specific social policy. One recent writer while criticizing this situation succinctly summarized it:[4] . . . "The Commonwealth Arbitration Court has become in practice an economic planning body rather than a body to settle disputes. It deals with matters of over-riding economic importance, where a wrong decision could undermine the health of a nation's economy. . . ." The System then has tended to become a regular partner with the employers and the unions in framing socio-economic policy. Moreover, in frequently fulfilling part of the decision making or interest preserving function of both the employer group and the union, it has made these bodies dependent upon it and has tended, in effect, to deprive them of much of their independence or autonomy. One able observer described the effect of the Arbitration System on Australian trade unions as follows:[5]

> "It is my opinion that in Australia the trade union is fast becoming, on its industrial side, very largely an agent of the Government and that, consequently, it tends to regard political action more important than industrial action. Trade unions in Australia are more concerned about politics than industrial action. They have concentrated very largely upon political action, believing it to be the most important thing to

[4] C. D. Kemp, "Arbitration Reform," *Institute of Public Affairs Review*, IV, (8) (Melbourne, 1950).

[5] Maurice Blackburn. *Trade Unionism—Its Operation Under Australian Law* (Melbourne: Victorian Labor College, 1940).

> have Labor men returned at elections and that the Labor Party will improve industrial legislation and enable the unionist to have better wages and conditions from the industrial tribunals than before. I cannot help but feel that the system we are developing in Australia is not at all a good one for the trade unions. I feel that the system by which a trade union is made freer to develop within the law is much the better one. Our system is appropriate only to a rather small and fairly stable community. And when the community outgrows its present conditions, I feel that our present system of industrial arbitration will have a very great shock."

So much then for a description of this one concept of arbitration: for want of a better term we can refer to it as an *administrative approach* to the problem. As such it has been advocated by such leading Arbitration Court judges as Justice Higgins and the incumbent, Mr. Justice Foster. It has been particularly successful in that basic Australian industrial area, the Pastoral Industry.

The alternate concept, first mentioned above, emphasizes the juridical aspect of the Arbitration System. It is more than pure legalism since it predicates that the parties, themselves, (the unions and the employer organizations) "will carry the ball" and that the Arbitration System should do no more than adjudicate between the contesting arguments. In any case, the officials are not to read into their judgments their own personal views of social policy. Judicial notice, to use the lawyers' jargon, is severely limited, and the court or the official is not to use an official position to press for or against reform.

"As I conceive them," said Mr. Justice Kelly in an early case,[6]

> "there is in the function of an Industrial Court no room for experiments such as may originate in the realm of politics or in the fertile field of sociological ideals. The Court is constituted to remedy injustice. The injustice must be proved in terms of facts and of the recognized rules of human life and fair dealing. These will, of course, vary as civilization progresses; but until they are accepted by the community as part of the regulative code for its transactions, they must be

[6] *Public School Teachers' Case,* XIII *South Australian Industrial Reports* 18 (1934-35).

> treated by the Court as not having emerged from the regions of social idealism. The Court has no right to assume the role of reformer. Having discovered an injustice, however, it is bound to devise a remedy. But the remedy should be sufficient for its purpose and nothing more, for further interference by the Court is unwarranted and, in my view, beyond the limit of its jurisdiction."

This view is similar to the one sketched by James Madison in the tenth *Federalist Paper* and emphasizes the rights and responsibilities of pressure groups. It emphasizes the socially autonomous functions of the employers' groups, the unions, and the Arbitration System, and we give it the short title of the autonomous approach or concept of arbitration. It is advocated by strongly organized unions, by well integrated employers' associations, and by those judges who view skeptically the use of their official position by proponents of reform. Judge O'Mara and the present Chief Judge, Mr. Justice Kelly, are among the leading practitioners of this approach. It is interesting to note that these men are the favorite judges of highly organized unions and well integrated employers' associations. This approach has met with relative success in the largest Australian secondary industry, the Metal Trades industry. In this case the rank and file unionists look to their unions for protection rather than to a beneficent Court: similarly, the employers look to their own organizations.

* * *

Which of these two approaches is better? A single answer to this query probably does not exist, since it depends upon what the interested parties want, and whether there are alternative ways to getting it through arbitration. From 1930 until 1947 some Labor Party adherents argued that there were too many restrictions or legal impediments to *administrative* arbitration still remaining and in the 1947 Act, they "remedied" the situation. They provided that all inter-state Australian industries be divided into related groups, and that a single specialist be chosen to handle arbitration and conciliation in each group. A resulting criticism has been that the System is too flexible and that it lacks sufficient effective powers to make its awards stick.

Technically, the officials are to employ conciliation tactics before they issue arbitral awards, but in actual practice this technicality is not particularly important. Since 1930 most of the punitive powers

normally associated with courts have not been applied in industrial relations law, and if the parties were strong enough to flaunt the Court's authority, *and would* not need its benefit shortly afterwards, there was little that the Court could do to punish recalcitrance. In these instances the Court would have to exercise its skill as a conciliation agency. Conversely when the parties needed the Court's goodwill and cooperation, the authorities' patience could quickly tire and an arbitration award, even an unfavorable one, would be accepted. Hence, it is fair to conclude that the line between arbitration and conciliation is not always evident and the reserve arbitral power, in so far as it really exists, conditions the parties' thinking not only during the negotiations preliminary to a formal hearing, but also when the authority formulates its awards. *In toto* the Court's effective power is based on appeals to reason, the parties' need for the Arbitration System, a very limited ability to enjoin and punish offenders (mostly for contemptuous attitudes towards the Court), and the possibility of mobilizing public sentiment. None of these presents a sure key to success.

In summary, then, we can conclude that there are two approaches to arbitration in Australia and that the success of their system is not only a result of their own unique historical experience, but even *more* a result of the System's adaptability to what the parties want and need. Australia's national culture has had a homogeneous base and its industrialization is very recent. Since 1948 the ideological problem splitting the left wing or militant unions from the System has become apparent. Whether the System can survive in this changed environment is, naturally, problematical. Furthermore the issue seems to be ideological rather than purely economic, and as such the pressure to have the Parliament handle it has grown. Thus we submit that while the Australian Arbitration System is complex and while its experience does illustrate two alternative approaches to the problem of giving the public a voice in matters of industrial relations, the future of this institution and its success is directly tied up with the coming developments on the ideological and political scenes in that country.

# REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under the main headings of: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

## I. THE ARBITRATION CLAUSE

**Arbitration clause** printed on the reverse side of contracts, when brought to the attention of the contracting party, is binding upon it. Said the Court: "On the reverse side of the contract are set forth in clear type the various provisions of the contract, containing seventeen paragraphs. Paragraph 15 thereof relates to arbitration of any controversy arising under the contract or in relation thereto. The statement or claim that the respondent's attention was not called to the printed clauses on the reverse side of the contract is a subterfuge, for on the main side of the contract, and in clear and express language, is the following: 'This order is given subject to the terms herein stated and those on the reverse side hereof including arbitration which are hereby accepted by the buyer'. . . . There is no legitimate ground of opposition." *Fabricana, Inc.* v. *Lowell Adams Factors Corp'n,* N.Y.L.J., July 13, 1951, p. 75, Greenberg, J.

**Sales notes,** issued by the same broker for the purchaser and seller, when received without timely objection by the parties, "constituted a sufficient memorandum to evidence the contracts consummated between the parties (*Matter of Huxley,* 294 N. Y. 146: *Catz Am. Sales Corp'n* v. *Holleb & Co.,* 272 App. Div. 689, aff'd 298 N. Y. 504; *Matter of J. K. Knitting Mills,* 273 App. Div. 591). . . . Such objections as were developed later were made by the buyer with respect to the sellers' contract forms, and not with respect to the sales notes, which, in accordance with trade custom, were the memoranda of agreement binding the parties." The party was therefore obligated to proceed to arbitration. *Pine Grove Mfg. Co., Inc.* v. *Rock Island Mills, Inc.,* N.Y.L.J., June 22, 1951, p. 2324, Breitel, J.

**Consignee's claim** that a shipment delivered by charterers was short arose out of the bill of lading, and not out of the charter party containing an arbitration clause. The court held: "A general statement of incorporation of the terms of the Charter party, in a bill of lading, is insufficient to incorporate an arbitration clause of the charter party in the bill of lading (*The Thrasyvoulos,* D.C., 28 F. Supp. 434)." *Son Shipping Co., Inc.* v. *De Fosse & Tanghe,* 96 F. Supp. 595 (District Court, S.D. New York; Noonan, D.J.).

**Whether a trustee** in bankruptcy may be compelled to arbitrate is still an unsettled question (see Collier, On Bankruptcy, 14th edition vol. 2, p. 1063,

section 26.02.) Said Judge Patterson in *Matter of Grain Products Corporation,* 20 Fed. Supp. 348 (1937): "Whether a debtor in a reorganization should, as a general rule, be forced to specific performance of a contract to arbitrate, is a matter on which there seems to be no authority." Recently in a bankruptcy proceeding for an arrangement, a stay of arbitration proceedings up to and including the rendering of an award by the arbitrators was vacated and ordered that "the said award may be filed herein in connection with determining the amount of claim" of the creditor in this proceeding. *Matter of Handbags and Accessories, Inc., Debtor,* District Court, S.D. New York, No. 87606, Joyse, Referee in Bankruptcy, August 6, 1951.

**In the absence of any arbitration agreement** the buyer, who was required to pay the balance of a purchase price, suggested arbitration. The failure of the seller to arbitrate as suggested was no violation of any contractual or legal duty. Said the court: "A party who has not agreed to arbitrate violates no legal duty that we know of in failing to take arbitration in substitution of the ordinary litigation process, and therefore no inference is to be drawn from his refusal to arbitrate." *Consolidated Water Power and Paper Co.* v. *Spartan Aircraft Co.,* 185 F. 2d 947 (Court of Appeals, Third Circuit; Goodrich, C.J.).

**When a company** which purchased a portion of the employer's business showed neither expressly nor impliedly by its actions that it assumed the liability of another company (Edelbrew Brewery, Inc.) under the latter's contract with the union, the company cannot be compelled to arbitrate an issue which it has never agreed to arbitrate, the court referring to *Application of Swift & Co.,* 76 N.Y.S. 2d 881. *Copenhagen Castle Beer Corpn.* v. *Beer Drivers Local Union No. 24, C.I.O.* N.Y.L.J., August 15, 1951, p. 262, Keogh, J.

**Allegation that price of goods** exceeded the selling price and that contract providing for arbitration was therefore illegal does not justify a stay of arbitration. Said the court: "Some issue as to it [the validity of the contract] must be raised by factual assertions. The general rule is set out in *In Re Bernstein* (176 Misc. 563). No special exception for the particular question of price regulations is in order. It is true that the present regulations do not make the price permitted to be charged a definite figure, but only one that can be ascertained through establishing other facts. These other facts may be difficult to establish. But the necessity for some grounds of belief that an inquiry will show a violation remains." *Morris Shoenthal, Inc.* v. *Deering-Milliken & Co., Inc.,* N.Y.L.J., June 4, 1951, p. 2055, Steuer, J.

**When a maintenance and support agreement** contains an arbitration clause referring to disputes "concerning any of the provisions of this agreement", an arbitrator is not authorized to make an award, by way of set-off or otherwise, for damages resulting from an alleged breach of a separate tax-fund agreement which contained no arbitration clause and which was not incorporated into the maintenance and support agreement by reference. *Stone* v. *Freezer,* N.Y.L.J., August 31, 1951, p. 349, Nathan, J.

**Assets of a partnership** were taken over by a corporation of the same name. In a lawsuit for breach of contract for non-delivery of raisins, the defendants, namely the partnership, the corporation and the two individual partners, entered with the buyer into a stipulation to submit the controversy to arbitration. An award against the seller was confirmed and its challenge refuted although the signature under the submission was without designation

as to either partnership or corporation. Said the court: "It was intended that the submission to arbitration was made by all of the defendants and that no question of liability or non-liability as among the several defendants or between the partnership and the corporation was involved. The facts speak so plainly the intention of all parties signatory to the stipulation to be bound by the award that the judgment confirming the award against it is impregnable to any of the appellant's refinements of argument." *Safeway Stores, Inc.* v. *Vagim Packing Co.*, 232 Pacific Reporter 2d 306 (District Court of Appeal, First Dis., Div. 2, California; Dooling, J.).

**General contractors' agreements** with subcontractor were made subject to the General Conditions of the American Institute of Architects. The Standard Form of Arbitration Procedure incorporated by the General Conditions, provides for arbitration to which the defendant objected in stating: "There is nothing to arbitrate. The matter is closed." Plaintiff did not attempt to pursue the arbitration procedure but brought an action at law. Said the court in reversing and staying the court action until arbitration shall be had in accordance with the agreements: "Where parties have provided for a definite procedure for initiation of arbitration proceedings, it is, generally speaking, incumbent on the party claiming the right to arbitration to follow such procedure (*Matter of Oltarsh* v. *Classic Dresses*, 255 App. Div. 532). Where he has failed to do so, he does not establish waiver because of the refusal of the opposing party to proceed to arbitration, except in the clearest kind of case, in which the facts demonstrate the complete futility of following the stipulated procedure." *Beaver Concrete Breaking Co., Inc.* v. *Nadal Baxendale, Inc.*, 278 App. Div. 929.

## II. THE ARBITRABLE ISSUE

**Damages for delay in the performance of a construction contract** which provided for arbitration under article 40 of the General Conditions of the American Institute of Architects, were considered clearly a claim subject to arbitration. The court referring to *Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 199, where Judge Pound stated: "Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration, but where a *bona fide* dispute in fact arises over the performance of a contract of purchase and sale it does not devolve upon the court to say that as a matter of law there is nothing to arbitrate. It may be that under the rules of the Raw Silk Association matters of strict law are subordinated to a course of dealing or to the equities of the case. Difficult questions of law as well as of fact may arise. By the terms of the contract, disputes whether of law or fact are arbitrable. Traders may prefer the decision of the arbitral tribunal to that of the courts on such questions. When they have selected their tribunal, the court ought not to interfere with them unless very substantial reasons are shown (*Wood* v. *Tunnicliff*, 74 N. Y. 38, 44; *Smith, Coney & Barrett* v. *Becker, Gray & Co.*, 1916, 2 Ch. 86)." *Matter of Constitution Square, Inc.*, N.Y.L.J., June 25, 1951, p. 2344, Young, Referee.

**Right to cancel a contract** which permitted the seller to require payment in advance of delivery of goods under certain stated circumstances and to terminate the contract upon the buyer's failure to pay any amount due under the contract, is an arbitral issue within the meaning of the contract providing for arbitration of "controversies arising out of or relating to the contract." *Alpert* v. *Admiration Knitwear Co.*, 278 App. Div. 841, 104 N.Y.S. 2d 309.

**On the arbitrability of repair work** under a lease, the court, in denying a motion to stay arbitration, said: "The language of the agreement to arbitrate of course, must be sufficiently broad so as to permit the application of the general principle that all issues subsequent to the making of the contract are not for the court but for the arbitrators. Where, however, as here, the language of the provision providing for arbitration uses not only the phrase 'any and all controversies arising out of the contract' but also 'any and all controversies in connection with the contract,' this language would appear sufficiently broad to express the intention of the parties to include within the exclusive jurisdiction of the arbitrators as a general rule all acts by the parties giving rise to issues in relation to the contract, except the making thereof." *Monarch Associates, Inc.* v. *Air King Products Co., Inc.*, 101 N.Y.S. 2d 899, Arkwright, J.

**A contention** that there is no dispute to arbitrate under the rules of the General Arbitration Council of the Textile Industry because the obligations of the seller of textiles under the terms of the contract would be fulfilled by the forefeiture of deposits, was refuted. The court considered this controversy "a question for the arbitrator to determine if it be held that a valid agreement to arbitrate was consummated by the parties." *Cohen* v. *Braka & Co., Inc.*, N.Y.L.J., July 9, 1951, p. 45, Bartels, J.

**Owners of adjoining properties** agreed to submit to arbitration the question what portion, if any, of the cost of waterproofing a wall which was being removed, shall be borne by one party. It was agreed that the term "waterproofing" shall be with a reasonable regard to cost and aesthetics. An award which was challenged in that the arbitrators had included in the award the cost not only of waterproofing the wall, but of repairing and finishing it, was confirmed. *142 Fiftieth Corporation* v. *150 East Fiftieth Street Corp.*, 302 N.Y. 868, aff'g 277 App. Div. 1029, 100 N.Y.S. 2d 1013.

**"Service Credits"** to which an employee may be entitled for the time he is absent on strike, is not an arbitrable controversy when the collective bargaining agreement does not provide for such payment to persons absent for more than two weeks, except in the case of a "compensable accident, illness or lack of work." An arbitration was therefore stayed. *General Electric Co.* v. *United Electrical, Radio and Machine Workers of America*, N.Y.L.J., July 9, 1951, p. 41, Schreiber, J.

**Vacation pay** could be awarded to certain strikers for the period they worked before the strike though they were not called back to work, since they remained employees, by reason of having the right for a year to be called back if the employer increased its operations. The court said: "No one could foretell definitely on the date of the contract that they would not be called back. They had then exactly the same status as all the other strikers and were employees in the same sense." The dispute was thus considered within the scope of the arbitration clause including the interpretation, construction and application of the terms of the contract, and the judgment confirming the award of the Impartial Chairman was affirmed. *American Federation of Hosiery Workers* v. *Pohatcong Hosiery Mills, Inc.*, 16 Labor Arbitration 637 (New Jersey Superior Court, App. Div.).

**Grievance of a layoff** of 800 to 1088 employees alleged to be out of line of seniority was denied because no list of employees was submitted by the union

which requested the company to permit it to compile such a list from the company's own record. The challenge to an arbitration which was initiated by the union was refuted by Presiding Judge Henninger, Court of Common Pleas of Lehigh County, Pennsylvania, who stated: "The grievance is one contemplated by the agreement between the parties and therefore it is for the arbitrator to determine not only the substantive rights of the parties, but compliance with the proper procedural steps as well, since the procedure is also fixed by the agreement and there is a dispute over the interpretation of the agreement in that respect." In affirming the Supreme Court of Pennsylvania said: "What plaintiff seeks is a decision on the question whether the supplying of this list is a prerequisite to the consideration of the grievance and to make it arbitrable. . . . We agree with the court's interpretation of the agreement which is that whether the grievance has been presented in the proper form, whether the plaintiff has the right to refuse to consider it until it obtains the list demanded, and whether the points raised are arbitrable at this time, are all questions for the arbitrator." *Mack Manufacturing Corporation* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local No. 677, C.I.O.*, 16 Labor Arbitration 862 (Supreme Court of Pennsylvania, Eastern District; Ladner, J.).

**Reopening of contract** pertaining to wages and hours is an arbitrable issue under a clause of a collective bargaining agreement which provided that, after amicable negotiations proved futile, any grievance or dispute could be submitted to the State Board of Mediation and Arbitration. This general provision for arbitration, said the court, "contains no hint of any limitation." *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 145* v. *Shapiro*, 16 Labor Arbitration 671 (Connecticut Supreme Court of Errors; O'Sullivan, J.).

**Whether a permissible strike** was a "satisfactory explanation" for being absent from duty was considered an arbitrable issue under a national agreement, without regard to the back-to-work agreement without an arbitration clause, since the national agreement provides for arbitration "in the event that no agreement is reached on any matter involving the application or interpretation of any provision of this contract." The controversy arose as to whether employees are entitled to continuity of service notwithstanding their absence from work for eighteen days because of strike. Said the court in denying a motion to stay arbitration: "If, as is possible, the strike did not constitute a breach of the agreement but, on the contrary, was authorized thereby, arbitrators could properly decide that the permissible strike was a "satisfactory explanation" within the meaning of the national agreement. *General Electric Co.* v. *United Electrical, Radio and Machine Workers of America*, N.Y.L.J., June 26, 1951, p. 2351, Schreiber, J.

**Breach of no strike-clause** in collective bargaining agreements is an arbitrable issue under an arbitration clause including "all differences, disputes and grievances, other than discipline and discharge cases, hereinafter provided for, between the parties arising out of or by virtue of the within collective labor agreement." The court refuted the contention that arbitration was intended to prevent strikes and lockouts and was not intended to be resorted to after a strike had occurred, in saying: "The provisions of the contract in this respect are very broad. . . . We believe this language is clear and unambiguous, it does not admit of any explanation or limitation by parole evidence or otherwise. *Gianni* v. *R. Russel & Co.*, 281 Pa. 320 (1924). On the contrary, it seems clear to us that if the employer had occasion to resort to the grievance and arbitration machinery of the contract, it would very likely be in connection with the strike." *Pennsylvania Greyhound Lines, Inc.* v. *Amal-*

*gamated Association of Street, Electric Railway and Motor Coach Employees of America, Div. 1063,* 16 Labor Arbitration 906 (U. S. District Court Western District of Pennsylvania; Stewart, D.J.).

**Whether service men** on electric typewriters come within the general classification of "Service Department Employees" was considered an arbitral issue under a collective bargaining agreement. The court, in denying a stay of arbitration, said: "The court should not interpret whether the contract covers service men working on electric typewriters. That should be left to the Arbitration Board." *Royal Typewriter Co.* v. *Mechanical & Electrical Workers Union of America, No. 1 Independent,* 104 N.Y.S. 2d 332, Corcoran, J., aff'd 277 App. Div. 982, 100 N.Y.S. 2d 403.

**Where union had denied** under oath the allegations of a complaint that it had threatened to picket the premises of distributing companies, or that it had been improperly engaged in organizing employees of creameries, an interlocutory injunction was to be vacated, all the more, as the court said, "Both parties assert that they are willing to submit the matter to mediation or arbitration. Settlement of controversies by arbitration is favored by the courts. *Machine Printers Beneficial Association* v. *Merrill Textile Print Works,* 12 N.J. Super 26, 78 A. 2d 834 (App. Div. 1951); *Newark Milk & Cream Co.* v. *Local 680,* 12 N.J. Super 36, 78 A. 2d 839 (App. Div. 1951). If the creameries are in fact merely corporate instrumentalities of the plaintiffs, as the defendants contend, then it may be that the dispute is arbitrable under the broad arbitration provision of the contracts between the parties. The plaintiffs, however, deny the guilt of the milk companies and the creameries, but aver that, nevertheless, they are willing to arbitrate. Accordingly, since both parties desire arbitration or mediation of the dispute, they should have it, even though not required by contract." *Borden's Farm Products of New Jersey, Inc.* v. *Local Union No. 680, International Brotherhood of Teamsters,* 80 Atlantic Reporter 2d 326 (Superior Court of New Jersey, Chancery Division; Freund, J.S.C.).

**A clearance provision** in a collective bargaining agreement provided that "the failure of any employee to be cleared for access to or transmission to him of classified information by the duly constituted security agents of the United States Government or of the Armed Services thereof shall constitute just cause for discharge, and the discharge of any employee who has not been so cleared shall not be subject to the grievance and arbitration procedure of this agreement." The court held that the meaning of the language employed should be determined by the arbitrator "without probing into the reasons, if any, for the delay in the determination of the employee's status by the armed forces." *Sperry Gyroscope Co.* v. *Engineers' Ass'n,* N.Y.L.J., June 18, 1951, p. 2251, Hecht, J.

**Vacation benefit** of employees was provided in only one provision of a collective bargaining agreement. The union therefore may not arbitrate a claim to additional vacation benefits. Said the court: "A party to a contract containing an arbitration clause will not be permitted to obtain arbitration of a claim for which no colorable basis is to be found in the provisions of the contract itself." *Ryerson* v. *Schorsch & Co., Inc.,* N.Y.L.J., August 15, 1951, p. 259, Gold, J.

**Time and one half-provision** of a collective bargaining agreement for work performed during lunch period related to work during regular lunch periods

and contained no exceptions in the event of an emergency. Due to a power shortage, the employees were given an early lunch hour and required to work during their regular lunch hour. In the absence of an express provision for such a contingency, the employer was held liable by an award in an arbitration proceeding when he did not object to the right of the arbitrator to hear the matter. In view of such waiver, the objection that the arbitrator changed the provisions of the contract and thus exceeded his power, was rejected and the award confirmed. *United Pencil Workers Local Industrial Union, No. 934, C.I.O.* v. *Niagara Box Factory, Inc.*, 104 N.Y.S. 2d 878, Eder, J.

## III. ENFORCEMENT OF ARBITRATION AGREEMENTS

**Reference to the settlement of controversies** by the arbitration board of the New York Produce Exchange does not meet, as such, the jurisdictional requirements of section 1450 C.P.A. regarding service other than personal service "for arbitration in this state." Arbitration clauses in cases previously decided have either specific reference to New York City (*Merger Fabrics, Inc.* v. *Coill-Shuman Co.*, 74 N.Y.S. 2d 76) or to rules of associations which provide for the type of service to give jurisdiction such as the National Federation of Textiles (*Liberty Country Wear, Inc.* v. *Riordan Fabrics, Inc.*, 197 Misc. 581, 96 N.Y.S. 2d 134, digested in this *Journal* 1950, p. 228) or the American Arbitration Association (*Bradford Woolen Corp.* v. *Freedman*, 189 Misc. 242). A motion to compel arbitration was therefore denied. *L. N. Jackson & Co., Inc.* v. *Compania Gasoliba, Soc. Anon.*, N.Y.L.J., July 11, 1951, p. 58, Dickstein, J.

**An unsigned proposed arbitration agreement** constitutes no basis for a claim that a party waived its right to arbitration under the contract which provides for a determination of disputes, in the first instance, by the architect. The architect made the determination only after the proposed arbitration agreement had been submitted and allegedly refused. Then a court action to recover the balance due on the construction contract and for extras was commenced without resort to arbitration pursuant to the contract. Since there had been no waiver, a stay of the court proceedings was to be granted. *Puma* v. *1223 Ave. J. Corporation*, 278 App. Div. 831, 104 N.Y.S. 2d 205, reversing the decision digested this *Journal* 1951, p. 52.

**A motion to vacate an award** was denied on the ground that the petitioner "having acted upon the contract for its benefit, cannot now be heard to say it was coerced into signing the contract." *Wisefield's, Inc.* v. *Dist. 65, Distributive, Processing & Office Workers of America*, N.Y.L.J., June 21, 1951, p. 2307, Hammer, J.

**The Federal Arbitration Act** was held applicable to a collective bargaining agreement containing an arbitration clause since such contract is not a "contract of employment" within the meaning of sec. 1 of the Act, the court referring to *United Office and Professional Workers of America, CIO* v. *Monumental Life Insurance Co.*, 88 F. 602 (digested in this Journal, 1950, p. 69) and to the court's opinion of August 1, 1951 in *Hoy Jones, Sr.* v. *Mississippi Valley Barge Line Co.*, No. 164 in Admiralty. *Pennsylvania Greyhound Lines, Inc.* v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Div. 1063*, 16 Labor Arbitration 906 (U. S. District Court, Western District of Pennsylvania; Stewart, D.J.).

**Federal jurisdiction** does not exist in a controversy between a union and an interstate motor bus carrier regarding the arbitration of proposed changes in a collective bargaining agreement especially with respect to the establishment of a pension plan. The court held that the federal courts on a motion to compel arbitration are only competent when the controversy arose out of laws of the United States respecting collective bargaining between employers and employees in interstate commerce. Here the controversy only arose from subsequent contract relations of the parties. "The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship (*Barnhart* v. *Western Maryland Ry. Co.*, 4 Cir., 128 F. 2d 709). . . . It is not alleged that there is a substantial dispute between the parties respecting the validity, construction or effect of some law of the United States, upon the determination of which the result depends." The demand for arbitration was therefore to be dismissed for lack of jurisdiction. *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of America, Division No. 1127* v. *Southern Bus Lines, Inc.*, 189 F. 2d 219 (Court of Appeals, Fifth Circuit, St. Louis, Miss.; Borah, C.J.).

**Waiver of arbitration** of a dispute for breach of a construction contract may be found in an inactive attitude of a party after an award was vacated. Said the Supreme Court of New Jersey in a majority decision (Chief Justice Vanderbilt dissenting): "When an arbitration has gone to an award and the award stands impeached and set aside without fault by the claimant [in a subsequent court action for damages] and without appropriate and timely effort by the parties, or one of them, toward reinstatement of the arbitration, the parties are thereby relegated to their former rights and remedies, and an action will lie on the underlying demand. When all parties to an agreement to arbitrate elect to prosecute their respective claims by actions at law and institute and carry forward the course thus elected, the logical, indeed the necessary, result of that course is an abandonment of arbitration and a revocation of the agreement to pursue that form of adjudication." *McKeeby* v. *Arthur*, 7 N.J. 174, 81 A. 2d 1.

**Financial inability** to pay advanced by the party in an arbitration proceeding does not allow it to put in issue the making of the agreement to arbitrate or his failure to comply therewith (sec. 1458 C.P.A., subdivs. 1 and 2). An award was therefore confirmed. *Kreindler* v. *Saks*, N.Y.L.J., June 20, 1951, p. 2290, Schreiber, J.

**Though a respondent** is not a party to the agreement which contains an arbitration clause and consequently is not entitled to a stay of court action as a matter of right pursuant to C.P.A. sec. 1451, an order of Special Term which stayed all proceedings in the action until arbitration be had, was nevertheless affirmed. Said the court: "The order was properly granted in the exercise of the court's discretion, to avoid the simultaneous prosecution of the action and the arbitration proceeding, both of which involved the same controversy." *Flash* v. *Goldman*, 278 App. Div. 829.

**Expiration of the contract** does not prevent the arbitration of a controversy on the validity of reductions of piece work rates. Said the court: "The fact that the contract has expired and that respondent is no longer the bargaining agent of the employees does not preclude it from arbitrating the propriety of acts of the petitioner which occurred prior to the expiration date of the contract. If the pay reductions are found by the arbitrator to have been

improper, he may award damages although the contract has expired." *Dumont Electric* v. *Cliff*, N.Y.L.J., August 15, 1951, p. 259, Gold, J.

**Discharge of employee** for alleged incompetency was referred to arbitration and subsequently a complaint was made to the National Labor Relations Board that the discharge was solely for union activity. The contention that such recourse constituted a waiver of arbitration and that the Board had exclusive jurisdiction of the controversy was refuted. In denying a stay of arbitration the court said: "Such jurisdiction [of NLRB] would extend to matters in controversy which were cognizable by the board, i.e., unfair labor practices, and not to all disputes between employers and employees. Any other conclusion would completely nullify most arbitration provisions in collective bargaining agreements in the larger industries and create chaos in the smoothly working machinery set up in those industries for the settlement of disputes. The arbitration proceeding and the one before the board are entirely different ones predicated upon different facts, contracts and laws. There is no conflict between them and each may proceed without interference by the other. It follows from the divergent character of the two proceedings that invoking the jurisdiction of the board subsequent to the demand for arbitration would not constitute a waiver of the arbitration. There was no election to ignore the agreement of arbitration, but solely the selection of another tribunal to decide a different matter which could only be determined there." *Allen B. Dumont Laboratories, Inc.* v. *Baker*, N.Y.L.J., July 10, 1951, p. 51, Greenberg, J.

**Exhaustion of grievance procedure** is a prerequisite for any further steps in the settlements of disputes. In denying a motion for a temporary injunction the court said: "The statement that a member of the shop committee said that he was 'not interested' in the 'grievance procedure' is insufficient to excuse plaintiff's failure to comply with the requirements of subdiv. 4 of sec. 876a C.P.A." *Decca Records, Inc.* v. *Van Clief*, N.Y.L.J. September 12, 1951, p. 448, McNally, J.

**Defendant in a suit for breach of contract** had the right under the contract to arbitrate, but filed in the State Court of Michigan an answer and interposed a counter-claim and a plea of arbitration as an affirmative defense. During the pending of the suit for a number of years it did nothing, however, to bring about arbitration. It did not apply for a stay of proceedings under Sec. 3 of the U. S. Arbitration Act but actively participated in the lawsuit anticipating a court trial of the issues. The defendant thus waived its right to arbitrate. The contention that any initial waiver of its right to arbitrate is not effective or binding because it is not supported by any consideration was refuted by the court which said: "It is true that an executory waiver, being in the nature of a promise or a contract, must be supported by consideration in order to be enforceable. But a waiver, partaking of the principle of an election, like an election needs no consideration, and cannot be retracted. It partakes of the nature of an executed transaction." *American Locomotive Co.* v. *Gyro Process Co.*, 185 F. 2d 316 (Court of Appeals, Sixth Circuit, Detroit, Mich.; Miller, C.J.), aff'g 87 F. Supp. 754, digested in this *Journal* 1950 p. 70.

## IV. THE ARBITRATOR

**Sending lists of arbitrators** to the parties pursuant to the regular practice of an arbitration agency, may not be mandatory. In an arbitration between a union and members of the Electronics Manufacturers Association, an arbitrator was appointed by the New York State Board of Mediation and notice of the

designation was sent to the union's counsel. Such notification was considered sufficient notice to the union who sought a stay of the arbitration. Said the court: "It was the custom of the Mediation Board to submit a list of proposed arbitrators before making a final appointment. There is no indication that this practice is binding upon the Mediation Board or was contemplated by the parties which entered into the collective bargaining agreement. It was a voluntary arrangement not directed or required by the Board." *Adams Laboratories, Inc.* v. *United Electrical, Radio & Machine Workers of America, Local 430,* N.Y.L.J., June 27, 1951, p. 2366, Hecht, J.

**An arbitrator having discounted** certain notes given by one party of the arbitration to the other, made him a creditor of one of the parties and thus inherently disqualified him. Knowledge of this fact when the arbitration agreement was drawn, does not remove such disqualification. Said the court: "Every safeguard must be thrown around an arbitration proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties. Nothing will be permitted to cast suspicion upon their proceedings. Arbitrators sit as a court and their first requisite is judicial impartiality and freedom from bias. It follows therefrom that the existence of any fact which may affect the impartiality of any arbitrator will render that arbitrator incompetent to make a valid award. (*Matter of Friedman,* 215 App. Div. 130)." *Lastmor Products Mfg. Corp'n* v. *Storozum,* N.Y.L.J., July 10, 1951, p. 54, Bartels, J.

**Previous good character** is no statutory requirement for an arbitrator. A conviction for violation of regulations of the Office of Price Administration did not justify the setting aside of an unanimous award on the ground that the arbitrator was legally disqualified to serve. The Special Term decision, 103 N.Y.S. 782, digested in this *Journal,* 1951, p. 121, was reversed. The court stated (Cohn, J. dissenting): "Neither of the parties knew of the conviction, nor did the arbitrator volunteer to disclose it. The losing party first learned of it after the award by making inquiry of a commercial credit agency concerning the arbitrator. There is no proof that the fact of conviction would not have been disclosed, if such inquiry had been made prior to the arbitration." *Knickerbocker Textile Corporation* v. *Leifer Mfg. Corp.,* 278 App. Div. 351, 105 N.Y.S. 2d 200.

**The principle of functus officio,** namely that arbitrators, once an award is delivered, have no authority to modify or even interpret the award, was recently stated by the Court of Claims in a proceeding under the Indian Claims Commission Act of 1946 where the House of Representatives had referred a claim to the Senate. The latter's action in appropriating a lesser sum did not destroy the Indians' right to the amount formerly awarded them by the Senate. The court said: "The soundness of the generally accepted doctrine that once an arbitrator has made his award, the rights of the parties to that award are vested and cannot be destroyed by a later attempted modification of his award, is well illustrated here. The pressures brought to bear upon the Senate as arbitrator, by the House as legislator and economizer, now aware of the merits of the claims, were calculated to compel and did compel the arbitrator, as legislator, to change its position. Because of its dual role, the arbitrator here was peculiarly vulnerable." *Loyal Band or Group of Creek Indians* v. *United States,* 97 F. Supp. 426 (U. S. Court of Claims; Madden, J.).

**Majority decision of arbitrators** under an agreement that the decision of the three arbitrators "shall be final" was considered invalid, since the award was signed by only two of the three arbitrators and the third arbitrator refused

to sign. The court said: "It is the general rule under the common law that when a matter of purely private concern is submitted to the determination of the arbitrators, there must be unanimity of conclusion unless otherwise indicated by the terms of the submission. As the submission to arbitrators was a delegation of power for a mere private purpose, it was necessary for all to concur in the award since it had not been otherwise provided by the parties. We consider that the agreement to select three arbitrators and to accept their decision as final is not equivalent to an agreement to receive the decision of two of them as final." *Carhal Factors, Inc.* v. *Salkind*, 76 Atlantic Reporter 2d 252 (Supreme Court of New Jersey; Case, J., Chief Justice Vanderbilt and Justice Oliphant dissenting).

**Cancellation of a contract** is a matter to be considered by the arbitrators as long as the entering of a valid contract containing an arbitration clause is not disputed. In a case where the petitioner contended that the contract was cancelled by written agreement of the parties the respondent claimed the cancellation invalid because of its execution being effected through duress and coercion. The court said: "An issue had, therefore, arisen concerning the alleged cancellation. That issue must be submitted for decision to the arbitrators. Especially must this be so where, as here, the arbitration clause provides, in pertinent part, that arbitration should be had of 'any controversy or claim arising out of, or relating to' the agreement. (C.P.A. sec. 1450; *Lipman* v. *Haeuser Shellac Co.*, 289 N. Y. 76, 80-81." *In re Minkin*, N.Y.L.J., July 19, 1951, p. 113, Colden, J.

**A motion of the employee** to compel arbitration of a dispute on unpaid vacations was granted, since the employees may set up defenses of waiver and estoppel in such court action. It was said: "The court is not to consider the merits of the controversy. The pertinent questions are: Whether there is in fact a dispute, whether there is a contract to arbitrate, and whether there is a refusal to arbitrate. All other issues in the proceeding, whether of law or fact, and whether raised by denial or defense is for the arbitrator exclusively (*Lipman* v. *Haeuser Shellac Co.*, 263 App. Div. 880, aff'd 289 N. Y. 76; *Cinderella Bag Co.* v. *Berger*, 97 N.Y.S. 2d 623)." *Atlantic Basin Iron Works, Inc.* v. *Blake*, N.Y.L.J., June 20, 1951, p. 2295, Brower, Referee.

**Findings and award** of arbitrators shall not be disturbed by an appeal to the courts. In a dispute for work, labor and materials allegedly furnished beyond the scope of a contract regarding electrical work in a printing plant, a majority award awarded the contract maximum price. In affirming the award, the court said: "On a motion to vacate the award of arbitrators, every inference of fact should be drawn in favor of the contestant having the award. *Pennsylvania Turnpike Commission* v. *Smith*, 350 Pa. 355, 39 A. 2d 139. The general rule has been stated that unless their powers are limited by the agreement of submission, the arbitrators are the final judges of both the law and the fact, and their award will not be reviewed or set aside for a mistake of either." *Electric Power Construction Company* v. *Allen, Lane & Scott, Inc.*, 367 Pa. 319, 80 A. 2d 799 (Supreme Court of Pennsylvania; Chidsey, J.).

**Whether the rights of employees** were to be determined from the date of employment with predecessor companies or from the inception of the company in which they were merged are findings to be determined by the arbitrators which the court, in confirming the award, "is without power to review." *Livingston* v. *Eagle Lion Classics, Inc.*, N.Y.L.J., August 22, 1951, p. 295, Breitel, J.

## V. ARBITRATION PROCEEDINGS

**Examination before trial by parties to an arbitration** (See this *Journal*, 1950, p. 72, 1951, p. 54) remains a much disputed issue under Special Term decisions of the New York Supreme Court. In a recent decision a motion for such examination was denied for the following reasons: "The procedure in arbitration is a matter for the arbitrators. If they wish to let one party question the other without being bound by his answers they will do so. If they wish to allow the questioner further opportunity to investigate after receiving the answers they will do so. What more is there to an examination before trial? On the other hand if the arbitrators do not so elect, the court is powerless to compel them to accept the result. They can not be directed to accept such excerpts as the examiner may care to use. In addition the scope of such examination must be limitless because there being no rules of materiality it is impossible to put bounds on the examination. No court can say what will or should interest the arbitrators. Under these circumstances an avenue would be opened to harassment so wide that few would hestitate to enter. The consequences would be ruinous. It would follow that discretion, if any exists, should be exercised to refuse the right." *Duberstein Iron & Metal Co., Inc.* v. *Bache & Co.*, N.Y.L.J., June 4, 1951, p. 2055, Steuer, J.

**Motion to stay arbitration** must be made within the ten day limitation of sec. 1458 C.P.A., subdiv. 2. Said the court: "Failure of compliance with the provisions of the contract regarding conditions precedent to submission does not invalidate the notice to arbitrate. It is one of the issues specified by the statute which must be raised within the ten-day limitation by a motion for a stay." *Associated Amus. Machine Operators* v. *Lichtman*, N.Y.L.J., June 20, 1951, p. 2294, Kleinfeld, J.

**Consolidation of the special proceeding** to compel arbitration with a prior action based on rescission of the contracts for fraud cannot be had since the statute contains no provision for such consolidation. Said the court: "Even if there were such power, in the absence of express statutory authority, the power should not have been exercised in this case because to do so deprives petitioner of its rights to an immediate trial of the preliminary issue of fraud in the making of the contracts to arbitrate, which issue must be tried first." *Big W. Construction Corp.* v. *Horowitz*, 278 App. Div. 377, 105 N.Y.S. 2d 827.

**A motion to vacate** a warrant of attachment was denied, the court saying: "The existence of a contractual provision for arbitration does not furnish ground for the dismissal of an action brought by one of the parties to the contract or for the vacatur of an attachment obtained in such action. The defendant's remedy is to move to stay the action pursuant to section 1451 C.P.A. (*Auerbach* v. *Grand Nat. Pictures*, 176 Misc. 1031, aff'd 263 App. Div. 712; see also *Anaconda* v. *Am. Sugar Refining Co.*, 322 U. S. 42; *Murray Oil Products Co., Inc.* v. *Mitsui & Co.*, 146 F. 2d, 381)." *Murray Oil* v. *Compania Gasoliba*, N.Y.L.J., August 15, 1951, Gold, J.

**A fifth arbitrator** was not sworn nor was there adequate proof that notice of the hearing was given. A majority opinion of the court, reversing, did not confirm the award for $500. Dissenting Judge Dore mentioned that the amount of $300 was satisfactory to the arbitrators originally chosen by the appellant. The real grievance seems therefore not addressed to the finding but to the difference of $200. The dissenting Judge stated: "If this sort of thing is encouraged, arbitration instead of being an avoidance of litigation will

be provocative thereof. *Interest reipublicae ut sit finis litium." Frajer* v. *Chernofsky,* 278 App. Div. 798, 104 N.Y.S. 2d 215.

**Claim of non-union employee** for violation of departmental seniority was referred to an arbitration where the representative of both parties selected a disinterested third party, a principal of a school who had no connection with either party. An award unanimously rendered in favor of the company was confirmed. Any objection by reason of an alleged conspiracy in the appointment of the arbitrators which the party may have had was considered waived when the party proceeded with the arbitration, the court referring to *San Carlo Opera Co.* v. *Conley,* 72 F. Supp. 825, where it was said: "Where a party to an arbitration has knowledge of facts possibly indicating bias or prejudice on the part of an arbitrator he cannot remain silent and then later object to the decision of the arbitrators on that ground. His silence and inaction constitute a waiver of the objection." Moreover, the Superior Court of New Jersey, Chancery Division, stated: "In arbitration every intendment is indulged in favor of the award, and it is subject to impeachment only in a clear case. *Held* v. *Comfort Bus Line, Inc.,* 136 N.J.L. 640, 57 A. 2d 20 (Sup. Ct. 1948). Arbitration proceedings are favored by the courts and the courts will make all fair presumptions to sustain an award. *Eastern Engineering Co.,* v. *City of Ocean City,* 167 A. 522, 11 N.J. Misc. 508 (Sup. Ct. 1933)." *Hartwyk* v. *Monroe Calculating Machine Co.,* 80 Atlantic Reporter 2d 322, 16 Labor Arbitration 859 (New Jersey Superior Court, Chancery Division, Stein, J.S.C.).

**Minutes of arbitration hearings** do not constitute an irrefutable fact. Said the court in confirming an award: "The mere fact that the stenographer erroneously noted that the hearing was adjourned instead of closed does not change the fact that the hearing terminated. The minutes themselves indicate quite clearly that the respondent elected not to participate, and that the petitioner made a complete case." *Tele-Tone* v. *Davis,* N.Y.L.J. July 26, 1951, p. 149, Corcoran, J.

**Whether an arbitration held in Belgium** on the division of moneys collected for goods purchased in the United States for resale in Belgium was binding upon the New York purchaser as distinguished from its president who allegedly consented to such arbitration, is an issue of fact to be determined by trial. *Beol, Inc.* v. *H. S. Dorf Co., Inc.,* 278 App. Div. 896.

**Award directing employer** to discharge all of his employees for their alleged failure to join the union as required by a union shop clause in the collective bargaining agreement was confirmed. A motion for a stay of the procedure to enforce the award pending administrative proceedings before the National Labor Relations Board to invalidate the union shop clause was denied, and this order was affirmed (Dore, J., dissenting). *Weisler, as President of Metal Production and Novelty Workers Union, Local 28-A, A.F. of L.* v. *Burns,* 278 App. Div. 906, 105 N.Y.S. 2d 615.

## VI. THE AWARD

**Violation of seniority rights** in that employees junior in service were retained in employment contrary to the layoff provisions of a collective bargaining agreement led to an arbitration award by which the employee was reinstated, with the further determination that "the aggrieved employee is entitled

to recovery of moneys lost by virtue of the improper layoff." This award was confirmed in spite of the objection based on its alleged indefiniteness, the contract providing: "The question of back pay for the employee so reinstated shall be a question for the board of arbitration to decide." Said the court: "There is no fatal vagueness in the use of the phrase 'moneys lost' nor in the omission of any finding as to the period for which the award was made. The fundamental fact of the impropriety for the layoff has been settled adversely to the defendant. It has also been determined in the award that the plaintiff Hyde is to have damages. The computation of those damages, however constructive might have been the making of one by the arbitrator, is a legal consequence which need not be spelled out in the award." *Magliozzi* v. *Handschumacher & Co., Inc.,* 1951 Advance Sheets 815, 16 Labor Arbitration 808 (Supreme Judicial Court of Massachusetts; Wilkins, J.).

**Indefiniteness of an award** as amounting to an imperfect execution of the powers of the arbitrator, was not assumed by the court which said in confirming the award: "No matter what words are used by an arbitrator, it is not likely that every possible future contingency can be foreseen and embraced in an award. If both parties will, in good faith, abide by the determination, there should be no difficulty." (*Hollywood Auto Laundries, Inc.* v. *Peat,* N.Y.L.J., August 21, 1951, p. 288, Murphy, J.

**Adjustment of general average** arising from the stranding of a motor vessel was pursuant to the bills of lading to be made in Barcelona, Spain, "extra judicially by experts appointed by the shipowner," and be made up according to certain numbered provisions of the York-Antwerp Rules of 1924. An action of the owners of the vessels against the consignee for general average contribution established that the general average statement, in effect an award of arbitrators in a proceeding in which respondents did not participate, was prepared and stated in Bilboa rather than Barcelona and was made in accordance with all York-Antwerp Rules rather than only those specifically set forth. Libellants were therefore held not entitled to recovery of the amount claimed in accordance with the exact provisions of the bills of lading. *Compania Transatlantica* v. *Charles Pfizer & Co.,* 96 F. Supp. 217 (District Court E.D. New York; Inch, C.J.).

**An award** which had to be rendered within 30 days from the date of the closing of the hearings, under AAA Rule 40, was made, reduced to writing, signed and sent to the parties on the last day of the time period. AAA Rule 44 provides for the delivery by placing the copy of the award in the mail addressed to the parties. Under section 1460 New York C.P.A. an award has to be delivered to one of the parties or his attorney. Since the award was delivered on the last day, it was validly rendered within the time limits and therefore not open to invalidation. *Raymik Well Drillers* v. *Lipkin,* Supreme Court, Rockland County, N.Y., June 27, 1951, Doscher, J.

**Supplementary award** as directed by court order (278 App. Div. 348, 105 N.Y. 2d 262) may be made upon the evidence taken at the original hearing when a previous award was not set aside for insufficiency or impropriety with respect to the proof tendered or the conduct of the original hearing. Since the rehearing was directed by the court for the purpose of clarification or reconsideration of the award, it was, consequently, unnecessary to take new testimony. The award was therefore confirmed inasmuch as "the arbitrators acted properly in making a complimentary award upon the evidence taken at the original hearing." *Perlowin Studios Inc.* v. *Perlowin,* N.Y.L.J., Aug. 28, 1951, Nathan, J.

**When a judgment** was entered upon an award on support payment for a wife pursuant to an arbitration clause in a separation agreement, it rested primarily upon the contractual obligation of the separation agreement, and not on any marital obligation. The judgment could therefore not be enforced by contempt proceedings under sections 504 and 505 C.P.A., but only by execution. Said the court: "The parties cannot by incorporating into an agreement a provision with respect to arbitration concerning certain items and thereafter obtaining an award and judgment thereon make available for the enforcement of their agreement the drastic remedies provided by statute for the enforcement of a marital obligation created by law. Under such circumstances, the only remedy available to the plaintiff is that which would be available for the enforcement of any money judgment. The general rule of law is clear that a judgment, equitable or otherwise, which directs payment of a sum of money only is enforcible solely by execution." *Zuckerman* v. *Zuckerman*, 104 N.Y.S. 2d 787, Bartels, J.

**Arbitrators' award** under the Railroad Labor Act on seniority of different groups of airline pilots was not subject to impeachment by the disappointed groups, on the ground that the arbitrators reached their award by resort to prejudice or in disregard of the evidence submitted to them. The challenge that the arbitrators did not understand the problems presented to them free from any possible contractual coercion residing in a recently established classification, was not justified. The arbitrators made their own classification and announced it by attaching it to the award. Said the Court: "The fact that it was in accord with the existing tabulation of seniority did not constitute the latter something which they deemed to be binding on them, or on the parties to the arbitration agreement." *Petition of Brink. Air Line Pilots Ass'n, International* v. *Pan American World Airways, Inc.*, 98 F. Supp. 135 (U.S. District Court E.D. New York; Byers, D.J.).

**An award** cannot be vacated when the motion to set aside was served more than three months after the award was delivered to the party (sec. 1463 C.P.A.). Said the court: "The fact that the award was not specifically filed or confirmed within the statutory time did not render its effect any less binding on the parties. It was as between them a complete determination acquiesced in by both sides and a waiver of the necessity of any action in the court. (*Imbrici* v. *Madison Ave. Realty Corp'n*, 99 N.Y.S. 2d 762)." *Balter* v. *Rosner*, N.Y.L.J., June 19, 1951, p. 2276, Kleinfeld, J.

**Tenant sought to recover** an amount which he had deposited with the landlord as security for the performance of a lease. An Official Referee found that a previous arbitration award had validly determined that the amount was given as a loan to assist in reducing the mortgage on the premises and that the amount should be segregated in trust. The court stated that the tenant was barred in this plenary action commenced more than three years after the order confirmed the award from attacking the arbitration. *800 Union Street Corp.* v. *Bookben Realty Corp.*, 302 N.Y. 926, aff'g 278 App. Div. 708.

**Extension of time** for delay in completion of construction work, as determined by award, cannot be corrected by Special Term in reducing the amount awarded, "since the so-called miscalculations upon which Special Term predicated the modifications were not 'evident miscalculation of figures' within the purport and meaning of section 1462a C.P.A." The judgment of the Appellate Division who had reversed Special Term's modifications (277 App. Div. 1003), was affirmed. *Kew Queens Corp.* v. *MacArthur Concrete Pile Corp.*, 309 N.Y. 785.

**Fair rental award** under Emergency Rent Control Law was not filed or confirmed within the statutory time of one year. This, however, did not, as the court stated, "render its effect any less binding on the parties. It was as between them a complete determination acquiesced in by both sides and a waiver of the necessity of any action in the court. This did not destroy the arbitration. It is, for all purposes, a special proceeding (Civ. Prac. Act, sec. 1459) in the Supreme Court and the acts of the parties had the same effect as a settlement after an action had been commenced." *Imbrici* v. *Madison Avenue Realty Corporation,* 199 Misc. 244, Hammer, J.

**Failure to Examine Merchandise** does not lead to the vacating of an award. Said the Court: "Assuming that the arbitrators did not examine the merchandise subject to the controversy, there has been no showing that they refused to hear evidence or were partial. Petitioner in his supporting affidavit states that he asked that the goods be produced and was informed by the arbitrators that this would be gone into later. If they did not go into it later it was petitioner's obligation before the hearings closed under the very rules in effect to produce or if he could not produce to have respondent produce the merchandise. There has been no evidentiary matter set forth which would show any partiality." *Froom* v. *Itzkowitz,* N.Y.L.J., September 19, 1951, p. 539, Gavagan, J.

**Enforcement of New York judgment** entered upon an award may be had in Tennessee. After an award was rendered under the rules of the General Arbitration Council of the Textile Industry and a judgment entered upon the award by the Supreme Court of New York, the execution of the judgment was challenged by the Tennessee debtor because a court order was not obtained in New York pursuant to sec. 1450 C.P.A. The Federal District Court of Tennessee said that the "defendant was given an opportunity to raise those questions when confirmation of the award was applied for by plaintiff, as provided for in sec. 1458. But defendant did not choose to make such questions in the New York court. Since sec. 1458 specifically provides that the award of the arbitrator shall be valid unless contested in the manner set out in sec. 1458, the judgment of the New York court in confirming the arbitration award under the Civil Practice Act, as interpreted by the New York courts, is valid." The Court further said: "Parties to an arbitration contract may consent in advance to the manner of obtaining jurisdiction over the person of the absentee party and such agreement, if followed, will give jurisdiction: *Marvlo Fabrics, Inc.* v. *Jarus,* D. C. Mo., 87 F. Supp. 245: *Mulcahy* v. *Whitehill,* D. C. Mass., 48 F. Supp. 917." The Court thus held that the New York judgment was entitled to full faith and credit under Article 1, sec. 1, of the Constitution of the United States and Title 28, U. S. C. sec. 1738.

Since the award made no mention of the counter-claim of the buyer for defective goods and such claim was not considered by the arbitrators, such counter-claim would be separate from the award, and therefore the buyer would not be foreclosed from asserting his counter-claim in an action to recover the amount of the unpaid judgment rendered upon the arbitration award. *Hirsch Fabrics Corp.* v. *Southern Athletic Co.,* 98 F. Supp. 436 (D. C. E. D., Tennessee; Taylor, D. J.).

---

Note: The Sections on Notes, News, Publications and Documentations will be resumed in the next issue.